

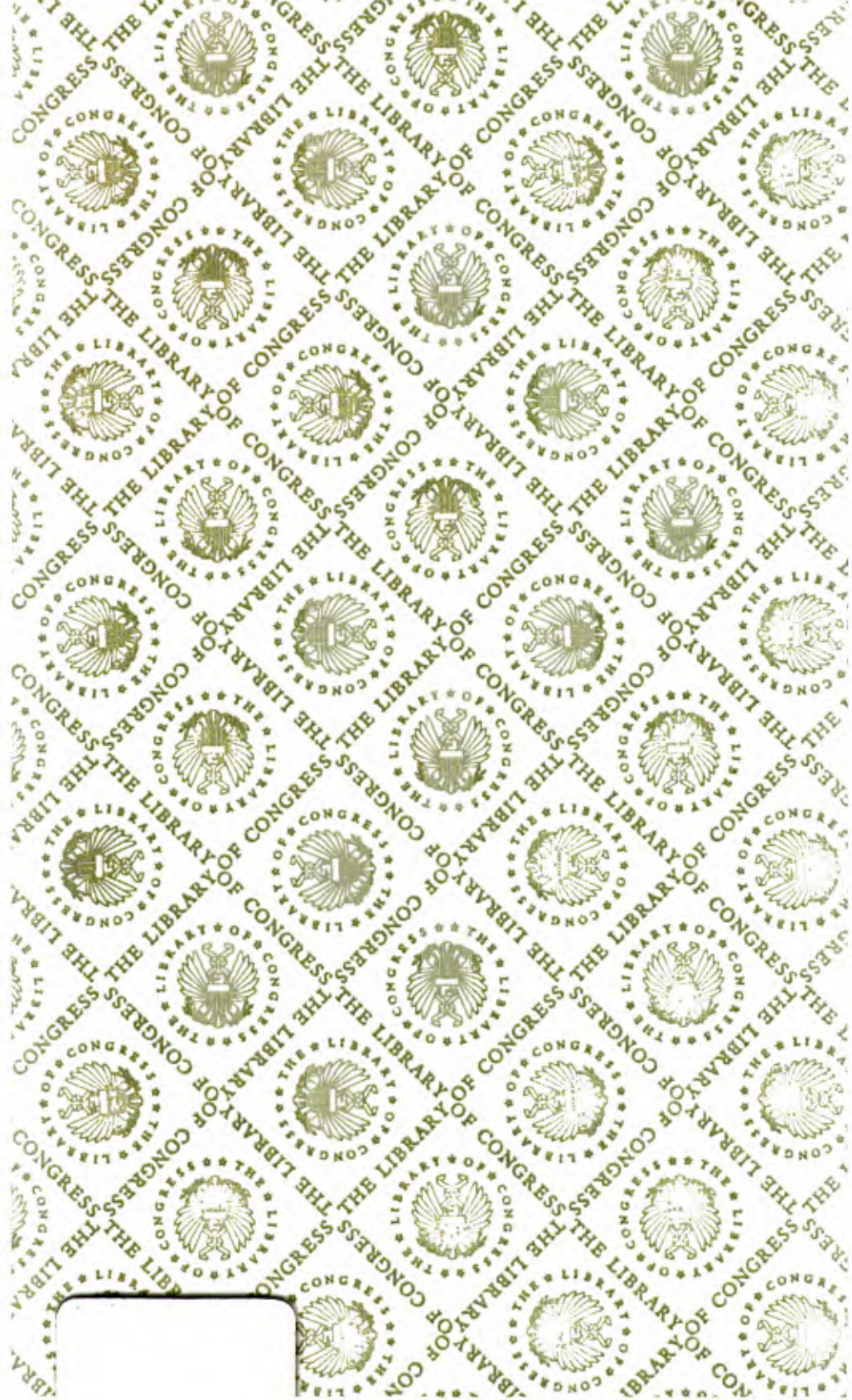
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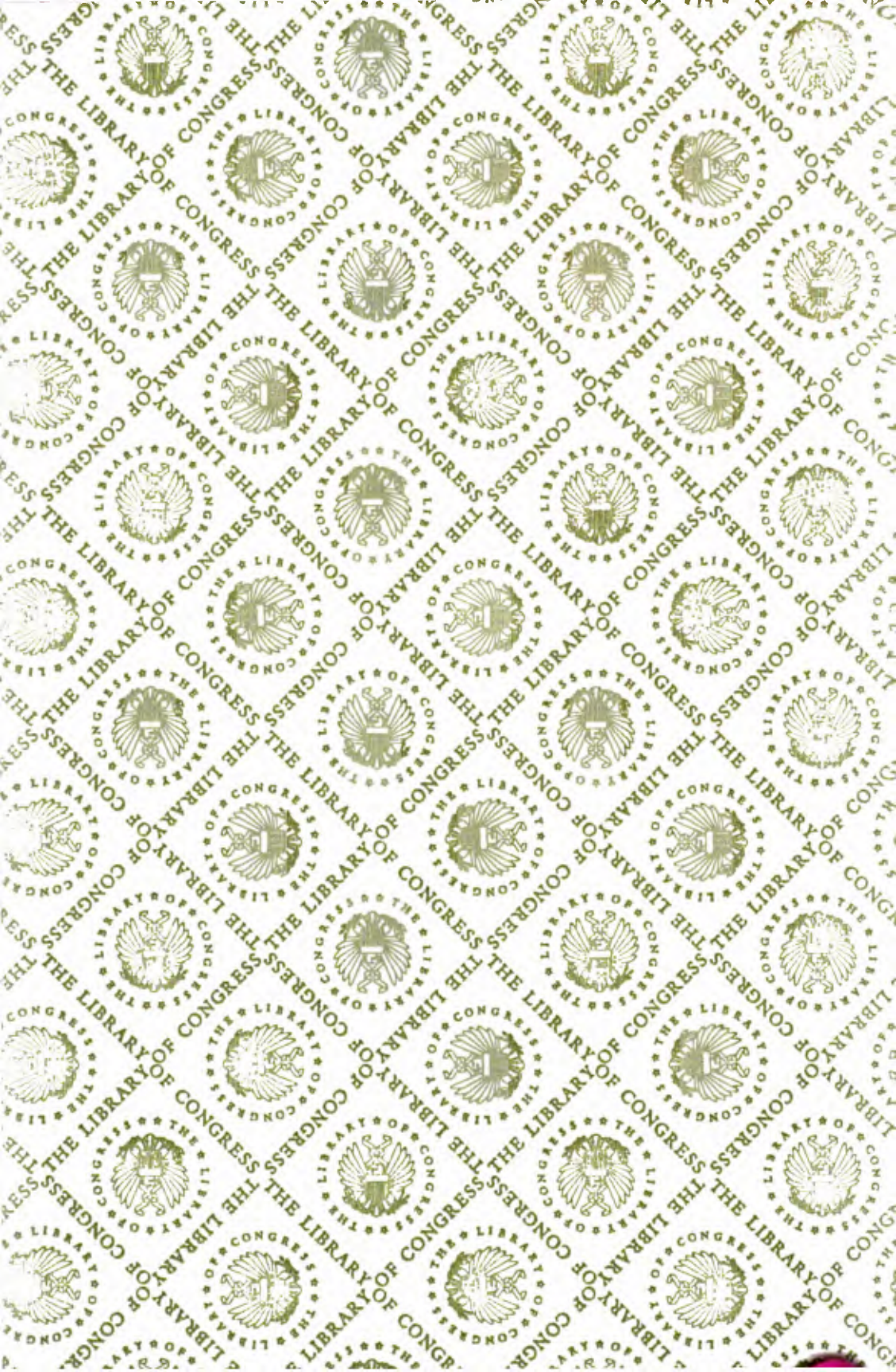
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STATES' CHOICE OF VOTING SYSTEMS ACT



HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1173

SEPTEMBER 23, 1999

Serial No. 41



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STATES' CHOICE OF VOTING SYSTEMS ACT

THURSDAY, SEPTEMBER 23, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2226, Rayburn House Office Building, Hon. Charles Canady [chairman of the subcommittee] Presiding.

Present: Representatives Charles T. Canady, Asa Hutchinson, Bob Barr, William L. Jenkins and Melvin L. Watt.

Staff present: Cathleen Cleaver, Chief Counsel; Bradley S. Clanton, Counsel; Susana Gutierrez, Clerk; and Anthony Foxx, Minority Counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will be in order.

This afternoon, the Subcommittee on the Constitution convenes to hear testimony concerning H.R. 1173: The States' Choice of Voting Systems Act, legislation introduced by Mr. Watt.

[The bill, H.R. 1173, follows:]

106TH CONGRESS
1ST SESSION

H. R. 1173

To provide that States may use redistricting systems for Congressional districts other than single-member districts.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1999

Mr. WATT of North Carolina (for himself, Mrs. CLAYTON, Mr. CLYBURN, Mr. SANDERS, Mr. CUMMINGS, Mrs. JONES of Ohio, Mr. SCOTT, Mr. FRANK of Massachusetts, Ms. LEE, Mr. THOMPSON of Mississippi, Mr. BROWN of California, Mr. HASTINGS of Florida, and Mr. DAVIS of Illinois) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that States may use redistricting systems for Congressional districts other than single-member districts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "States' Choice of Voting Systems Act".

SEC. 2. RIGHT OF STATES TO CHOOSE DISTRICTING SYSTEMS.

The Act entitled "An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting", approved December 14, 1967 (2 U.S.C. 2c), is amended by striking "In each State" and all that follows and inserting the following:

"SEC. 2. CONGRESSIONAL REDISTRICTING.

"In each State entitled in the One Hundred Eighth Congress or in any Congress thereafter to more than one Representative in Congress under an apportionment made pursuant to the provisions of section 22(a) of the Act of June 18, 1929 (ch. 28; 46 Stat. 26)—

"(1) there may be established by law a number of districts equal to the number of Representatives to which such State is so entitled and Representatives may be elected only from single-member districts so established, or

"(2) such State may establish a number of districts for election of Representatives that is less than the number of Representatives to which the State is entitled and Representatives may be elected from single-member districts, multi-member districts, or a combination of single-member and multi-member districts, if that State uses a system that meets the constitutional standard that each voter should have equal voting power and does not violate the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.)."

○

Mr. CANADY. As we are all well aware, the United States Constitution requires a decennial enumeration of a State's population and directs that reapportionment of congressional districts occur in the States according to that total population. Under current Federal law, State legislatures are required to use single-member districts when adopting their redistricting plans.

The current single-member district requirement was enacted in 1967. Prior to 1967, the use of single-member districts appears to have been the predominate method of electing Members of Congress, although the practices varied from State to State and from time to time.

In the early days of the Republic, most States with more than one representative divided their States into geographic districts with one representative in each district. Other States employed multi-member districts or even at-large elections.

In the early 1800's, numerous efforts were made to enact a constitutional amendment requiring single-member congressional districts. By 1842, however, most States had accepted the idea of local representation, the push for a constitutional amendment ended, and Congress enacted a law requiring contiguous, single-member congressional districts.

After the census of 1850, congressional redistricting legislation did not include the single-member district requirement. That requirement was not reinstated until the current statute was enacted in 1967.

H.R. 1173 would eliminate the single-member district requirement and permit States to choose from among single-member districts, multi-member districts or a combination of single- and multi-member districts.

The proponents of H.R. 1173 argue that it will assist State legislatures with the difficult task of congressional redistricting. Drawing these districts requires States to balance a number of competing considerations, including avoiding contests between incum-

bents, placing candidates in the same districts as their supporters, party affiliation, the "one person, one vote" standard, and the like. States must also ensure that their districts do not dilute or lead to retrogression of minority voting strength. Moreover, this process must conform to the Supreme Court's decisions striking down re-districting plans in which race was the predominate factor in drawing districts.

As we consider the merits of H.R. 1173, it is important to understand that the legislation may open the door to the use of controversial electoral systems in multi-member districts including cumulative voting and proportional representation. Under a cumulative voting system, voters in multi-member districts, are given a number of votes equal to the number of representatives in that district and can then distribute those votes among the candidates as they see fit, casting one for each of several candidates or aggregating them behind one or more candidates. Under a pure proportional representation system, political parties are represented in the legislature in proportion to their vote totals in a given district.

Many political scientists believe that cumulative voting systems undermine majority rule and the one person, one vote principle and that they are detrimental to the two-party system. Cumulative, voting has also been criticized for increasing ethnic division and separatism.

Some political scientists have also concluded that proportional representation systems undermine majority rule by allowing political forces with the support of only a minority of voters to win elections. Proportional representation systems have also been criticized for turning the focus of politics away from individual candidates and toward conformity to party, as voters are no longer choosing between candidates but between parties.

Whether or not these potential costs are outweighed by benefits of multi-member districts will be the subject of our inquiry at this afternoon's hearing.

I now recognize Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

Let me first apologize to the witnesses and you for being a little late. I had an amendment on a bill on the floor, and we just got through right at 2:00, and I rushed right over here. The consequence of that is that I left the notes that I was going to do my opening statement from in my office, so I am going to have to talk directly off the top of my head, which is probably just as good. I have lived with this subject for quite a while now.

I want to first thank the chairman for agreeing to schedule this hearing. It is the chair's prerogative to either schedule or not schedule a hearing and the subject matter of that hearing, and I acknowledge that and acknowledge his graciousness in allowing us to have this hearing, particularly on a bill that has so few cosponsors at this point and may or may not go anywhere.

And it is at that point that I want to start, because I want to assure my colleagues and the witnesses and the people in the audience that I really have no ax to grind in the introduction of this bill. I have no ax to grind in this hearing today.

It seemed to me appropriate to have a hearing to discuss the pros and cons, the merits or lack of merits of this particular bill,

and it seems to me in the introduction of the bill that the States ought to be able to add to their arsenal of possibilities of how they deal with congressional redistricting, this option, and they can make any evaluation at the State level of whether it makes sense or does not make sense and reach a rational conclusion about that. So I am not trying to program whether States use this option or not. I just think they ought to have the option available to them, and they can debate that at the State level and make their own judgment about it.

Let me put this in context. For almost a hundred years prior to 1992 there had not been a minority representative from the State of North Carolina in the Congress of the United States, despite the fact that the minority community made up approximately 22 to 25 percent of the population, depending on whose numbers you use. In 1992, based on the 1990 census, the State legislature in North Carolina drew 12 single-member districts, two of which, after some consternation, were either equal black white or majority black, depending on whose numbers you look at, and the purpose was to try to the best extent possible level the playing field and make it possible for a minority to be elected to Congress from the State of North Carolina.

I was the beneficiary in one of those districts. Eva Clayton was the beneficiary in the other district from North Carolina. Since that time, we have been in litigation in North Carolina constantly, and the lawsuit is still not over.

There is scheduled a trial, which Mr. Everett will attest to, to start in November of this year, November 1999, about districts that were drawn based on the 1990 census. Since that time, the early 1990's, I have also had person after person come up to me and say single-member districts that make it possible for minorities to be elected unduly polarize the community and districts along racial lines. In fact, the Supreme Court in a couple of its opinions has talked about Balkanization and polarization along racial lines. It seemed to me that one way to address that and to reduce that polarization would be to look at whether multi-member districts would help with that.

I have had people come up to me and say that single-member districts polarize the community along political lines, and it seemed to me that maybe multi-member districts could help reduce that polarization. I have had people come to me and say that single-member districts polarize along philosophical lines, and if you are a conservative and you live in Mel Watt's district—

Mr. Chairman, could I ask 2 additional minutes?

Mr. CANADY. The gentleman will have 2 additional minutes.

Mr. WATT. If you are conservative and you live in Mel Watt's district, you are essentially disenfranchised or if you are a liberal and you live in Howard Coble's district or some other more conservative, quote, unquote, person's district, you are disenfranchised because you don't have any input with other candidates.

And so, philosophically, districts polarize us and give us less opportunity to give our input to representatives who may disagree with us, who we may agree with and want to support. Yet we are kind of marooned on an island in a single-member district, and

therefore we don't have a voice. And it seemed to me that quite possibly multi-member districts might help to address that issue.

Now, do I think that this bill solves all those problems? I don't think that it does, nor did I introduce it for that purpose. But if it can help reduce that polarization and whether it is racial, political, or philosophical, if it improves the quality of our democracy, then I think the States ought to have it on the table as an option to discuss and debate and that State legislatures have as much judgment about this as we have at the Federal level.

And I also think that if we are going to act on this we need to act on it between now and the next redrawing of lines. Otherwise, we will be operating under a single-member format exclusively and not have this debate until 10 years from now.

So that was the basis on which this legislation was introduced—no hidden agendas, no political advantage, no racial advantage. Hopefully, an advantage for the democracy that we all adore.

I yield back, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Watt.

We will now proceed to the first panel.

I am sorry, Mr. Jenkins. Do you have an opening statement?

Mr. JENKINS. I do not, Mr. Chairman. Thank you.

Mr. CANADY. Thank you.

Now we will proceed to the first panel of witnesses.

The first witness on our panel this afternoon will be the Honorable Tom Campbell, who represents the 15th District of California. Congressman Campbell sits on three committees: International Relations, Banking, and Joint Economic. Prior to coming to Congress, Congressman Campbell was a professor at Stanford University, where he taught constitutional law and administrative law, and even since coming to Congress he remains a distinguished scholar of the law.

Following Representative Campbell will be Andrew E. Busch, Professor of Political Science at the University of Denver. Professor Busch has written several articles and books on the subject of elections and politics and has taught courses in presidential primaries, nominations and elections.

Our third witness on this panel is Judge Robinson Everett, an attorney with the law firm of Everett & Everett in Durham, North Carolina, and a Senior Judge on the United States Court of Military Appeals. Judge Everett also teaches part-time at Duke Law School.

Before President Carter nominated Judge Everett to the Court of Military Appeals in February 1980, Judge Everett served on active duty with the Air Force and worked in the Judge Advocate General's Department. He assumed office on April 16, 1980. Judge Everett was the plaintiff appellant in *Shaw v. Reno* and *Shaw v. Hunt*, both of which he successfully argued before the U.S. Supreme Court.

Next, we will hear from Anita Hodgkiss, the Deputy Assistant Attorney General of the Civil Rights Division at the Department of Justice. Ms. Hodgkiss has served as Deputy Assistant Attorney General since April 1998. She is responsible for the Division's voting, coordination, and review and educational opportunities sections.

Our final witness on this first panel is Abigail M. Thernstrom, Senior Fellow with The Manhattan Institute in New York. Ms. Thernstrom is the co-author of *America in Black and White: One Nation, Indivisible*. Her book entitled, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, received the American Bar Association's Certificate of Merit and was named the best policies studies book of that year by the Policy Studies Organization, an affiliate of the American Political Science Association. President Clinton chose Ms. Thernstrom as one of three authors to participate in his first town meeting on race in Akron, Ohio, in December, 1997.

I want to thank all of you for taking time this afternoon to be with us.

I would ask that you do your best to summarize your testimony in 5 minutes or less; and, without objection, your full written statements will be made part of the hearing record. I don't think anyone is going to insist on strict compliance with the 5-minute rule, but, to the extent that you can, summarize as briefly as possible. That would be helpful.

I will apologize in advance. We will be having some votes. At some point I fear there could be a series of votes that will interrupt the hearing. We will try to go over and come back as soon as we can. I think that could be slowing us down a little this afternoon.

But, with that, again I thank you.

Mr. CANADY. I will turn to Representative Campbell.

STATEMENT OF HON. TOM CAMPBELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CAMPBELL. Mr. Chairman, Mr. Watt, Mr. Jenkins, thank you for your courtesy and overly generous introduction. I came from a markup in International Relations, and I want to stay here for as long as I can until they summon me back for a quorum or a vote.

I applaud Mr. Watt for his leadership, and I think H.R. 1173 is a good piece of legislation. I wish to state why I think so, because it may be a tad controversial. I think it is beneficial to give the States greater freedom, and I heard Mr. Watt's remarks, and I know that was the burden of his advice as well. But I explicitly think that having multi-member districts allows the possibility of cumulative voting which to me is beneficial; and I would say, whereas this bill does not compel cumulative voting, I consider cumulative voting desirable—

Mr. Hutchison, hello, too. Pardon me if my peripheral vision was impaired—

Cumulative voting allows a self-defined minority to achieve representation. Without multi-member districts you can't do it. So this creates the opportunity for it, and then it would be left to State law with the option to adopt a multi-member district that could, as I read the legislation, also allow cumulative voting.

Now, I emphasize the word self-defined minority because that, to me, is essential. I think it is wrong for government to divide us according to race. I believe a color-blind government is the correct constitutional maxim as well as good public policy. And thus whereas the Supreme Court has struck down race conscious drawing of lines in order to create majority-minority districts, cumu-

lative voting with multi-member districts allows a self-defined minority, whether it be racial or not.

Whether it be economic or political or social or of any particular variety, it is not defined by government. It is, rather, defined by the individuals; and thus it seems to me to escape any condemnation under the 5th or 14th amendments and yet account for something very valuable.

I will hopefully humorously and not for any offense purposes explain the plight of a modern Republican in a conservative Republican caucus.

I am routinely outvoted. It would be nice if, for example, of the nine elected leadership positions three of them were moderates. It cannot be so, however, where as each one of them is put up to a majority vote it will always go to a conservative. If, however, we were to elect those nine as we elect a board of directors, cumulative voting, I would have nine votes. So would every other member of my Republican conference, and I would cast all of my nine for three individuals, as opposed to one for each of nine individuals. I would cast three for each, and the three moderates would make it to what I call the board of directors of the Republican Congress of the House of Representatives.

The model is corporate law. That is how many corporations—in fact, all corporations following Delaware corporation law are constructed.

But the point is, I define the minority within the majority. And this particular example I used was moderate Republican. It is not done by government, and it is not necessarily done by race. It does strike me as a very farsighted solution, and for this I applaud Mr. Watt—not that it was my thought; I believe it was, rather, his—to a problem of race conscious action and, nevertheless, the reality that we do have questions of representation in our society to this day and the possible dilution by the tyranny of the majority.

So although the words cumulative voting are not in the bill, I conclude by saying they are because it is permitted by the bill. It is a constitutional way to get to the problem that has bedeviled us with race conscious district line drawing. I strongly support H.R. 1173.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Campbell. We do understand your responsibilities in the International Relations Committee, so whenever duty calls there, we will certainly understand your departure. Mr. Busch.

STATEMENT OF ANDREW E. BUSCH, PROFESSOR OF POLITICAL SCIENCE, THE UNIVERSITY OF DENVER

Mr. BUSCH. Thank you, Mr. Chairman. Thank you all. It is certainly an honor to have an opportunity to come here today.

As Chairman Canady said, historically, of course, most representatives have been elected by single-member districts historically over time. It has been the norm partly because of the English tradition and the tradition of colonial assemblies which used single-member districts predominantly.

There have been exceptions. Before the mid-1840's about a third of the States used some method other than relying exclusively on

single-member districts, although most of them, six out of the nine in the time period of 1840 to 1841, actually elected all of their representatives at large. That was the most used alternative to single-member districts.

There were a few States that would use single-member districts plus a few multi-member districts added to their delegation, and there were a few cases where States would have all single-member districts but receive an additional seat because of reapportionment and then decide they didn't want to go to the trouble of redistricting and so they would simply elect that person or a couple of people at large.

When considering the potential effects of moving away from single-member districts, I think there are two major issues that have to be confronted. The first question—and it is the question I think that will probably receive the most attention—is what effect might this have on the electoral process? How may it change electoral politics? The answer to that really depends very much on what alternative method is used.

Cumulative voting, as Congressman Campbell has just mentioned, is one of the options. The effect of that would probably be to give some assistance to self-identified, cohesive minorities whether of an ethnic nature or political minorities to gain representation, although perhaps at the expense of majority rule.

Proportional representation would be another alternative method that could be used. That would work to the benefit of minority parties or even third parties if there were enough representatives at stake. You would have to have quite a few at stake for the threshold to be low enough for third parties to gain very many seats that way, but that would be possible.

Or you could have States move back to the at-large system that was widely used before the 1840's, in which case you would almost certainly wind up with a more homogenous delegation rather than less homogenous. By whatever definition of homogeneity in terms of party or region or ideology, you would get less rather than more diversity by that method.

The other electoral effect I think is worth considering, is that most of the alternative methods of election with multi-member districts or Statewide at-large elections of one sort or another would almost certainly drive up the cost of House elections because Members running for the House would have to reach more constituents. They might have to reach more media markets; and they would also, in most cases, have to differentiate themselves from more than one competitor. So I think that is a likely effect.

The other effect that would have to be considered would be the effect on government, and this also depends on the system that would actually be used. For example, if you have a proportional representation system, there would be, I think, a change in the nature of representation. Representatives would be more representatives of their party to their constituents and less individuals representing their constituents simply because the voting would be done on the basis of party rather than on the basis of individual candidates.

With either proportional representation or cumulative voting, you would have the potential perhaps for a broader variety of

voices but, at the same time, the potential for greater fragmentation. For example, in the proportional representation system in Israel, candidates who represent a very small proportion of the electorate still gain seats and are able to hold the balance.

No matter which of these systems would be used, as long as you have more than one member per district, or if you elect them all Statewide, the representatives would almost certainly be somewhat less tied to their constituents. One of the effects I think of single-member districts is that each person has just one Member of the House and that has an effect on the character of representation.

The final question, of course, is how likely is it—and this really is the last question—how likely is it that States would actually adopt a method other than single-member districts. And I think probably not very. I think in most cases the people making those decisions realize that there is already a structure in place, districts that are already in place—incumbents of both parties are already established, and I think there would be probably not very many States that would be willing to throw all of that into chaos.

In conclusion, I think it is true that this moves in the direction of federalism. That is good, as far as I am concerned, but I would caution you to consider this very, very carefully. Because any time you undertake a reform of this magnitude, there are almost certainly going to be unanticipated consequences and at least some of those will probably be undesirable consequences. So I would just urge you to be very careful when considering a change of this kind of magnitude.

Mr. CANADY. Thank you, Professor Busch.

[The prepared statement of Mr. Busch follows:]

PREPARED STATEMENT OF ANDREW E. BUSCH, PROFESSOR OF POLITICAL SCIENCE,
THE UNIVERSITY OF DENVER

I. HISTORICAL BACKGROUND

The use of single-member districts for legislative elections can be traced back to the development of the English Parliament and the colonial assemblies of pre-Revolutionary America. Consequently, from the beginning of the United States, a significant majority of states utilized single-member districts for the election of members of Congress. However, the Constitution itself does not specify whether districts are to be used or whether districts may have only one representative. Methods other than single-member districts for the election of U.S. House members were used by several states in the first half-century after adoption of the federal Constitution of 1787. Some states selected all of their Representatives at large (what was sometimes called the "general ticket" method), while others used multi-member districts or a combination of methods. For instance, a few states used single member districts for most of their Representatives but also maintained one or more multi-member districts; others added at-large Representatives to their single-member districts when they gained one or more congressional seats after a decennial reapportionment but did not wish to redistrict. While federal law began requiring single member districts for U.S. House of Representatives in the Apportionment Act of 1842, other lower jurisdictions such as some state legislatures and municipal governments continued using (and still use) alternative methods. As late as the 1840-41 election cycle, approximately one-third of states used a manner of representation other than purely single-member districts (six used the statewide general ticket method and three mixed single and multi-member districts).

II. EFFECTS OF SINGLE-MEMBER HOUSE DISTRICTS

It is widely held among political scientists that single-member congressional districts have had important effects on the development of American politics. First, these rules (combined with the winner-take-all feature used by most states in the Electoral College) have tended to support a stable two-party system encouraging the

major parties to build the broadest possible coalitions. Since each district has only one Representative, and that Representative is generally elected by plurality vote, only the strongest third parties have any chance of winning congressional seats. Evidence for this effect can be seen abroad. Great Britain, which also uses single-member plurality districts, has typically maintained a stable two-party (or at times two-and-a-half party) system; countries using some form of proportional representation or other multi-member district methods are more prone, like Italy or Israel, to political instability and/or a situation in which groups having the support of only a small proportion of the population nevertheless hold the decisive political balance. Additionally, the current system encourages a close tie between a U.S. House member and his or her geographic constituency, and makes it much more likely that varying regions of a state will be adequately represented.

III. POTENTIAL EFFECTS OF A MOVE AWAY FROM SINGLE-MEMBER DISTRICTS FOR U.S. HOUSE ELECTIONS

There are two basic types of potential effects which must be considered. The first is electoral: How would a move away from single-member districts alter the electoral structure of American politics? The second is related to governing: How would such a move change the behavior of Congress?

The answer to the first question depends entirely on what alternative form of election is selected by states. There are two crucial decisions states would have to make—a choice between statewide election of all representatives or the use of smaller districts, and a choice of specific methods of voting and allocation of representation.

States could revert to the statewide general ticket system widely used before the 1840s. In such a system, the state would elect all of its representatives on a statewide basis, with voters casting votes for as many candidates as there are seats and the top vote-getters being elected. The consequence of such a system would almost certainly be to reduce the diversity of state delegations. The statewide partisan, ideological, and/or regional majority could conceivably control the delegation without regard for the local variations that can currently obtain representation. In 1840–41, all six of the states using a general ticket method had one-party control of the entire delegation. Of course, this effect could be muted in states where there is a very close partisan balance or a very large number of unaffiliated voters, which might elect split delegations. It could also be muted if states used the same basic voting method but in multi-member districts. Each district would have fairly homogeneous representation—in 1840–41, three states used a total of eight multi-member districts, and all eight had one-party control—but multiple districts could produce greater variety statewide than a general ticket system. In any event, however, it is difficult to imagine that either at-large general ticket congressional elections or multi-member districts using pre-1840s rules would not reduce representational variety in comparison to the present.

Another option states could use either statewide at large or in multi-member districts would be some form of approval voting or cumulative voting. With approval voting, voters would indicate from the list of candidates which candidates they find acceptable, whether one or many. With cumulative voting, voters would have as many votes as there are seats, but could apportion them in whatever way they want (not necessarily one per candidate), including providing a single candidate with all of their votes. These systems are often touted by analysts hoping to increase minority representation, on the grounds that a committed and cohesive minority (whether political or ethnic) could win some seats by concentrating all of their votes on one candidate or a small number of candidates. If this argument is true, congressional delegation variety might be increased, though at the expense of the principle of majority rule and one-person-one-vote, and also possibly at the cost of the increased ethnic division of American politics. Recent events in the Balkans should remind us that national unity is not obtained automatically, and that there are good reasons to hesitate to build our electoral system around the deliberate cultivation of ethnic identity or separatism.

The third major option, possible in statewide elections in moderate to large states or in multi-member districts with a large number of representatives per district, would be to utilize proportional representation, in which party support would be translated proportionally into seats won. Like approval voting or cumulative voting, proportional representation would give an opportunity for political forces with the support of a minority of voters to nevertheless win seats. It would also have the effect of reorienting politics away from individual candidates and toward party conformity, since voters would be choosing between parties rather than between can-

didates. This reform is supported predominantly by third-party activists and political movements hoping to form third parties.

One electoral consequence that will almost surely accompany changes in this direction (with the possible exception of proportional representation) is that House elections in states that adopt any of these reforms will become more expensive. Each House candidate will have many more constituents to address, will probably have more media markets to reach, and will have to work to differentiate himself or herself from not one but many competitors.

The second question—the effects of a move away from single member districts on the way Congress governs—likewise largely depends on the precise alternatives instituted in states. Widespread use of proportional representation, and possibly of cumulative/approval voting, could easily lead to a fragmentation of Congress and increased leverage held by political groups outside of the mainstream. Especially given the narrow margin separating the parties in the House, it is not inconceivable that a small number of Representatives supported by a small proportion of the electorate could come to hold the balance, either demanding extreme concessions or simply refusing to allow the work of the House to go forward.

No matter what alternative electoral method is selected, a move away from single member districts will almost surely have another broad effect, as well, which is that House members will become less tied to their geographical constituency and less concerned with local affairs. Representing either whole states or much larger districts, and sharing constituents with other (perhaps several other) Representatives, those members of the House will probably deemphasize constituency service and place greater emphasis on legislating and on national issues. While the precise consequences of such a shift may be difficult to foretell, it can be said without hesitation that such a change would fundamentally transform the nature of representation.

IV. THE LIKELIHOOD OF A MOVE AWAY FROM SINGLE MEMBER DISTRICTS AT THE STATE LEVEL

The materialization of any effects, either electoral or governing, will depend first and foremost on how many states, with how many Representatives, actually take advantage of the opportunity to move away from single member districts. If states were beginning from scratch, it is likely that a variety of systems would be adopted, as indeed occurred in 1788–89. Under current conditions, however, I believe it is unlikely that many states would accept the disruption of established political patterns that would be produced by this type of electoral reform. While redistricting takes place every ten years, many districts have retained their essential shape through several redistricting cycles. Incumbent members of the House have established political bases within their districts, have developed close working relationships with state and local officeholders, and have acquired knowledge, experience, and seniority that are extremely valuable to their constituents and their states. It is unlikely that most of the state officeholders who would have to authorize a change would consider such a change beneficial. The most likely exception would be in states where one party controls both the executive and legislative branches of state government and maintains a wide lead among voters but does not have full control of the congressional delegation. In cases like these, state officeholders might be tempted to adopt a statewide general ticket system in an attempt to overwhelm local pockets of opposition-party strength. However, such maneuvering could be politically risky, and most states do not have the unified partisan control of state government that such an effort would require. There will be little pressure for proportional representation or approval/ cumulative voting in states where the parties are already roughly evenly represented, and little likelihood of its adoption in states where they are not. If proponents are hoping to increase the diversity of representation through this legislation, they are likely to be disappointed, and might want to redirect their efforts toward enlarging the size of the House, a reform which could achieve much the same purpose with greater effectiveness and at less potential cost to the political system.

V. SUMMARY AND CONCLUSION

In my view, the greatest strength of this proposal is that it pays a welcome respect to the principle of federalism. That principle, which is an essential component of the American constitutional structure, has been ignored and even undermined far too often in the last 70 years. Congress is to be commended for taking measures in recent years to restore some of the lost vitality of federalism, and this proposal could be considered part of that trend.

However, the actual benefits to the federal system of this proposal are modest and symbolic. It would entail no devolution of governmental functions and would in no way alter the existing balance of substantive power and authority between the states and federal government. There are, moreover, many reasons to be cautious. It is probable that few if any states would actually reverse 150 years of tradition and deliberately throw their sitting House members into a cauldron of uncertainty. Should a significant number of states defy this prediction over time, the most likely outcome is a homogenization of state delegations as majority parties press their advantage statewide. The alternative outcome, should proportional representation or approval/cumulative voting become widespread, could be to lend greater instability to American politics and to make the House more unmanageable. These devices could well be a useful check on the majority in a parliamentary system, in which power is otherwise largely unchecked, but it is far from clear that the American system requires more checks or that the legislative process should be made more arduous. And any conceivable reform would change, perhaps drastically, the character of representation in Congress.

Above all, electoral reforms of this magnitude almost always produce unintended (and undesired) consequences. The presidential nominating reforms after 1968 have ultimately produced a system that even the most ardent reformers seldom defend; the campaign finance reforms of 1974 have largely collapsed, but the \$1,000 individual contribution limit survives, forcing candidates for Congress and the presidency to devote disproportionate energy to fundraising rather than meeting people or discussing ideas. It is impossible to predict with certainty what the effects of this legislation would be, but that in itself is a reason for caution when dealing with something as fundamental as the way Americans elect the House. It is also reason to avoid the natural temptation to seek short-term partisan advantage. It is not at all clear that it is possible to accurately calculate the partisan consequences to such a proposal in the short-term, let alone the long-term; and such a calculation would in any event provide a poor substitute for consideration of the enduring national interest.

Mr. CANADY. Judge Everett.

**STATEMENT OF ROBINSON EVERETT, ATTORNEY AT LAW,
EVERETT & EVERETT**

Mr. EVERETT. Mr. Chairman, I also appreciate the opportunity to appear here today.

I felt a little concerned about accepting the invitation because the bill has been introduced by Congressman Watt, and I have been in a legal battle for the last 8 years affecting the constitutionality of his district and that of Representative Clayton. I certainly take at face value his comment he has no political advantage to obtain from that because, frankly, I think he and Representative Clayton are going to be reelected no matter what; and I accept certainly his statement that he wanted to open up some options for consideration.

My concern is like that of Professor Busch, that there are some unintended consequences; and I am very concerned that if without further safeguards there simply is a provision that there is no longer a requirement of single-member districts, we may be opening Pandora's box.

In my prepared statement, which includes an attachment concerning the history of redistricting in North Carolina, I have outlined some of my concerns, for example, as to whether or not an at-large election might be authorized and whether the consequences of that might be very undesirable from many standpoints, as, for example, if in California it resulted in nothing but Democrats or if in North Carolina it resulted in nothing but Republicans. There would also be, by the way, some additional duties for the Civil Rights Division in deciding what to preclear.

Frankly, I like the idea of preferential voting in many respects. And if there is an authorization for multi-member districts, certainly preferential voting of some type is an option that should be considered, but my concern is, where will the districts be? Will we go through the same process of gerrymandering and the same uncertainty that I think has, to a considerable extent, been cleared up with respect to the single-member districts?

I have outlined some of the potential harms; and, frankly, my conclusion at the present time is that we have received enough guidance, that the single-member district is probably the least of the evils to be used for the present, that the real solution is to encourage at the State level the creation of redistricting commissions which will create single-member districts. Or if it turns out that multi-member districts are authorized, then they as well. But it will create them without regard to political advantage, without regard to ethnicity and race except to the extent absolutely required by the Voting Rights Act and, perhaps this will sound horrifying, also without any advantage to incumbents. They will do it on a neutral basis, with standards that are set by the State and which will hopefully implement some of the values that we favor.

So, on balance, I come to the conclusion that the amendment has more potential harm than the good that can be achieved, although I certainly do not in any way impugn the motives of those who favor it.

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Judge Everett.

[The prepared statement of Mr. Everett follows:]

PREPARED STATEMENT OF ROBINSON EVERETT, ATTORNEY AT LAW, EVERETT & EVERETT

Mr. Chairman and Members of the Subcommittee; I am Robinson O. Everett, and I have not received any federal contracts or grants. As reflected in the curriculum vitae attached to my statement, I have served more than four decades on the Duke Law School faculty, was for more than a decade the chief judge of the Court of Military Appeals (now the Court of Appeals for the Armed Forces), served at one time as a counsel for Senator Sam Ervin's Subcommittee on Constitutional Rights of the Senate Judiciary Committee, and have been a lawyer since 1950. I am here as a witness today because in 1966, I successfully attacked in federal district court a politically gerrymandered congressional redistricting plan and then in 1992—both as a plaintiff and counsel for the plaintiffs—filed the suit which became known as *Shaw v. Reno*. In that case the Supreme Court established that racially gerrymandered congressional redistricting plans are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

The legal battle I began seven years ago to wipe out racial gerrymanders in North Carolina still goes on. Indeed I must return to North Carolina this afternoon to take a deposition in preparation for a trial in early November as to the constitutionality of a redistricting plan enacted by our general assembly in 1997 to replace the flagrantly unconstitutional 1992 plan. I have also attached to my statement a paper that I recently presented in Atlanta at the annual meeting of the American Bar Association. Therein I chronicle what has taken place in North Carolina on the redistricting front, and I suggest a possible remedy for some of the problems. My redistricting experience has provided me some perspective for evaluating H.R. 1173.

Having been in a long legal struggle with those who seek to preserve the racially gerrymandered congressional districts from which Representatives Watt and Clayton were elected, I obviously have some difficulty in being objective about a bill of which they are principal sponsors. Hopefully I have overcome that obstacle enough to provide you some meaningful observations and warnings.

My principal concern is that H.R. 1173, if enacted into law, would create more problems than it would solve. In the first place, it undoubtedly would generate new uncertainty. Under the language of H.R. 1173, a state apparently would be free to

have an at-large election wherein all its representatives might be elected from a single party. Such a result, if it occurred, could generate great dissatisfaction. For example, if California under its Democrat governor and legislature chose to conduct its congressional election in this way and then obtained a majority—or even a plurality—for an entire Democrat congressional slate, the resulting dissatisfaction on the part of Republicans in that state is easy to imagine.

Likewise, if my state, North Carolina, adopted such a plan and a Republican slate were elected to Congress, Democrats would be disheartened. Moreover, since in North Carolina over 95% of the African-Americans who register to vote register as Democrats and vote cohesively in the same manner, it would be unlikely that, if elected, a Republican slate would include a black candidate. In that event there might be complaints that the at-large plan violated the Voting Rights act of 1965. Indeed, in a state like North Carolina, where 40 counties are subject to preclearance under Section 5 of the Voting Rights Act, the Civil Rights Division might deny preclearance because of the possibility of retrogression from the current number of African-Americans who represent the state in Congress.

A partial solution might lie in some system of preferential voting like that used in a few cities in the United States and also used in some foreign countries. However, preferential voting may be difficult for many voters to understand. Also, it has the potential of encouraging third parties and splinter parties—a result distasteful to supporters of a two party system although favored by advocates of proportional representation. I must concede, however, that preferential voting would be far superior to racial gerrymandering as a means of facilitating minority representation.

If, instead of having a statewide at-large election of representatives, a state opted either only to have several multi-member districts or else a combination of single-member and multi-member districts, a new opportunity is created for racial and political gerrymandering. Having become somewhat cynical after my long battle in North Carolina, I anticipate that this new opportunity would be availed of in each state by whichever party controlled the legislature of that state. Moreover, if neither major party controlled the state legislature or if one party controlled but the governor was of a different party and had a veto power, a plan would probably be negotiated with little regard to the voters' interests. In creating each multi-member district, the question might arise of whether to use preferential voting in some form. This would raise the same issues I have already mentioned in regard to preferential voting if all the representatives were elected at-large.

Of course, creation of multi-member districts would reflect distrust for the rationale which led Congress decades ago to require single-member districts—a requirement later abandoned but reimposed in 1967. That rationale relies on the premise that it is desirable for a representative in Congress to be responsible for assuring that the needs of a defined group of people are made known to, and adequately considered in, the Congress. Conversely, the constituents in that representative's district are on notice as to who has a special responsibility to represent them, and they have a more meaningful opportunity for access to that person.

Consistent with that rationale some traditional redistricting principles have developed to better assure that the single-member districts will fulfill their intended purpose. Geographic compactness and contiguousness are among those principles; and their application facilitates communication between a representative and his or her constituents. Likewise the long-recognized principles of leaving intact the boundaries of existing political subdivisions and recognizing genuine communities of interest enhance participation by voters in the political process.

In my view, retaining single-member districts and enforcing traditional redistricting principles is today the best solution—rather than authorizing multi-member districts. While I realize that Representatives Watt and Clayton fear that this solution is inconsistent with assuring that a substantial number of African-Americans serve in Congress, I believe their fears are exaggerated. Indeed, the ability of Congressman Watt to win comfortably in a general election in a district in which the percentage of African-Americans within the total population has been reduced from well over 50% to about 35%, helps demonstrate that a majority-black district is not essential for electing a black representative. That success cannot be attributed only to his status as an incumbent. Instead it reflects increasing willingness of whites to "cross-over" and vote for qualified black candidates. Moreover, the "Packing" of blacks into majority-minority districts and thereby removing them from adjacent districts lessens the ability of African-Americans to influence elections in the adjacent districts.

My bottom line is that for Congress to allow use of other than single-member districts would do more harm than good. Instead of enacting H.R. 1173, I would urge Congress to restore the once-existing requirement that congressional districts be "compact;" and I mean "geographically compact," rather than "functionally compact."

Also, it would be helpful for Congress to clarify that satisfying the preconditions of *Thornburg v. Gingles* for a majority or minority district, requires that it be possible to form a congressional district in which a geographically compact majority of the citizens of voting age population are African-Americans who vote cohesively. Finally, states should be encouraged in every way to establish non-partisan redistricting commissions to draw boundaries without regard to party, incumbency, or race, except as mandated by the Voting Rights Act. Such commissions, which in the next decade will be used in several states for reapportionment and redistricting, provide the best means for assuring fairness in the redistricting process.

Hopefully this statement will help you in evaluating H.R. 1173. My own conclusion is that it should not be enacted in its present form. Indeed, its enactment would tend to reinforce the mistrust, cynicism, and feeling of futility that many voters already have with respect to the elective process.

RACIAL GERRYMANDERING: THE LAST DECADE AND THE NEXT MILLENNIUM

A view of the future is shaped by one's experience; and certainly my views as to racial gerrymandering have been shaped by the litigation which I initiated to end this unconstitutional practice in my home state of North Carolina. So that you will understand my perspective, I shall focus initially on the history of that litigation.

A. The 1992 North Carolina Redistricting Plan

In response to the 1990 census, which revealed that North Carolina was entitled to an additional congressional seat, the General Assembly enacted in June 1991 a redistricting plan that included a single majority-black district. That district was located in the northeastern part of North Carolina. The Department of Justice—relying upon its erroneous “maximization” interpretation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973b, see *Miller v. Johnson*, 515 U.S. 900 (1995)—denied preclearance of this redistricting plan because it was possible to create a second majority-black district.¹ Soon thereafter, in January 1992, the General Assembly enacted a new plan, which contained two majority-black districts—the First and the Twelfth. Each had a “bizarre” shape, as did several of the predominantly white districts. The First District was in the northeastern part of North Carolina, where the percentage of African-Americans in the total population is greatest. The Twelfth District wound in a “serpentine” manner through the Piedmont region, following generally along highway I-85 from Gastonia to Durham; and it used “white corridors” to connect concentrations of black citizens in Gastonia, Charlotte, Winston-Salem, Greensboro, High Point, and Durham. The Department of Justice swiftly precleared this plan. Under the circumstances, it had little choice because its “maximization” mandate had been followed.

However on February 28, 1992, just a few days after the new plan was enacted, the North Carolina Republican Party launched a constitutional attack against this plan on the ground that it was a political gerrymander designed to assist Democrats.² This challenge was promptly rejected by a three-judge district court. See *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992). At this time the state defendants were asserting that the plan could not be attacked as a political gerrymander because it actually was based on race and resulted from preclearance requirements of the Department of Justice.

On March 12, 1992, after the Republican challenge had failed, five registered voters in Durham, North Carolina—a city bisected by the Twelfth District—filed suit against various federal and state defendants.³ I was not only the attorney for these voters, but I was also one of the plaintiffs—along with a son of mine, my personal secretary, a Duke Law School colleague, and a longtime friend Ruth Shaw, who was the lead plaintiff. All of the plaintiffs were Democrats; and they alleged that the

¹ Although the Department of Justice under the Bush administration was not famous for its efforts in the field of affirmative action, as to redistricting it insisted on carrying affirmative action to an extreme. As a result, numerous contorted congressional districts popped up across the country. Some cynics have suggested that by “packing” blacks in some districts, the remaining districts were “bleached” and therefore were more likely to vote Republican.

² Basically, the Democrats had outsmarted the Republican Department of Justice by adroitly using computer technology to link scattered predominantly black census blocks, to form two majority-black districts and at the same time gerrymander the remaining districts in a manner whereby Democratic candidates would do well there as well.

³ The Attorney General and the Assistant Attorney General for the Civil Rights Division at the time were sued on the theory that the Attorney General's refusal of preclearance for a plan with less than two majority-minority districts caused the gerrymander. As the case progressed and the Clinton Administration took office, Attorney General Janet Reno was substituted as a defendant and subsequently the case was decided by the Supreme Court under the title of *Shaw v. Reno*.

1992 redistricting plan was motivated by race and was enacted to assure the election of African-Americans to Congress from the First and Twelfth districts.⁴ As to the state defendants, the action was predicated, *inter alia*, on a violation of the plaintiffs' right to equal protection under the Fourteenth Amendment—a claim which the Supreme Court later recognized as “analytically distinct.” *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (“*Shaw I*”); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). The plaintiffs were all white but their complaint had no allegation as to their race because under their underlying theory was a constitutional injury was inflicted on all registered voters regardless of race.

On April 27, 1992, the three-judge district court dismissed the suit as to all the defendants.⁵ District Judge Voorhees dissented as to the dismissal of the state defendants; and this dissent was a prelude to many later dissents by him during subsequent stages of the litigation. In its opinion, the court took judicial notice that the plaintiffs were all white and concluded that for this reason they had no Equal Protection right to complain of a racial gerrymander. The plaintiffs appealed to the Supreme Court, which, on December 7, 1992, noted probable jurisdiction.⁶ When the appeal was subsequently argued before the Court, counsel for the state-defendants readily acknowledged that the redistricting plan was based on race.⁷

On June 28, 1993, the Supreme Court reversed the lower court as to the state defendants and remanded the case for trial, *see Shaw I*. Thereupon, the state defendants radically changed their position and claimed that, although considered by the General Assembly, race had not been a predominant motive in drawing the two challenged districts. Even though these districts obviously were not “geographically compact,” the defendants insisted that they were “functionally compact.” Nevertheless, the District Court readily concluded that both districts were race-based—although a majority of the three-judge court held on August 1, 1994 that the two contested districts could survive strict scrutiny because they had been carefully drawn to meet the requirements of Section 2 and Section 5 of the federal Voting Rights Act. *See Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994).

When the plaintiffs appealed to the Supreme Court, the defendants continued to assert that neither the First nor the Twelfth District was motivated by race—an assertion somewhat at odds with the position they had taken in the first appeal.⁸ However, on June 13, 1996 the Court held that the creation of the Twelfth District had been motivated predominantly by race and that, contrary to the lower court's decision, this district could not survive strict scrutiny since it was not “narrowly tailored.” *Shaw v. Hunt*, 517 U.S. 899 (1996) (“*Shaw II*”). Even though they were white, the plaintiffs had standing to contest racial gerrymanders. However, because none of the plaintiffs were registered to vote in the First District, the Court ruled that they lacked standing to challenge that district and therefore its constitutionality would not be decided. *See id.* at 904. The case was remanded for further proceedings.

Shortly thereafter, Martin Cromartie and two other persons filed suit in the Eastern District of North Carolina to challenge the First District as an unconstitutional racial gerrymander. Since all three plaintiffs were registered to vote in that congressional district, they clearly had standing under *Shaw II*.

Meanwhile, the successful appellants in *Shaw II* were seeking without success to persuade the General Assembly to enact a new redistricting plan for the 1996 elections. Those plaintiffs also were unable to convince the three-judge district court that it should draw a redistricting plan for the 1996 elections unless the General Assembly promptly did so.⁹ However, the district court did rule that unless the Legislature drew a new plan by April 1, 1997, the court would itself do so. In light of

⁴Of course, each of these two representatives would be a Democrat since 95% or more of the African-Americans in North Carolina are registered as Democrats.

⁵*See Shaw v. Barr*, 808 F. Supp. 461 (1992), *rev'd in part*, 509 U.S. 630 (1992).

⁶When jurisdiction was noted, various groups filed amicus briefs. Among others, the Republican National Committee filed in support of appellants; and the Democratic National Party with the NAACP and the ACLU filed amicus briefs on the appellees' behalf.

⁷*See oral argument in Shaw I*, Tr. at 14, 22 (“[T]he North Carolina General Assembly intentionally created two majority-minority congressional districts.” . . . “There's no dispute here over what the state's purpose is. There's a character over how to characterize it legally, but we're not in a disagreement over what the state legislature was trying to do” (H. Jefferson Powell, on behalf of the state appellees)).

⁸Because the five plaintiffs were white, the state defendants also contested the ruling of the three-judge district court that they had standing.

⁹*See Judgment in Shaw v. Hunt* (No. 92-202-CIV-5-BR, filed July 31, 1996). Like most of the rulings of that court, it was by divided vote, with Judge Voorhees dissenting. Subsequently, the *Shaw* plaintiffs were unsuccessful in seeking a writ of mandamus from the Supreme Court to require the district court to adopt a remedial plan for the 1996 elections. *In re Shaw et al.*, 518 U.S. 1045 (1996).

the developments in the *Shaw* litigation, Cromartie and his fellow plaintiffs agreed to a stay of proceedings in their action.

B. The 1997 Redistricting Plan

On March 31, 1997, the General Assembly enacted a new redistricting plan whereunder Durham County and three other counties were removed from the Twelfth District. Since all five *Shaw* plaintiffs resided in Durham, they no longer were registered to vote in the Twelfth District; therefore, under *Shaw II* they lacked standing to challenge that district.¹⁰ After the Department of Justice granted preclearance of the 1997 plan, the three-judge district court entered an order on June 9, 1997 directing the *Shaw* plaintiffs to advise the court within ten days "whether they intend to claim that the plan should not be approved by the court because it does not cure the constitutional defects in the former plan and to identify the basis for that claim." In their response, the plaintiffs stated their view that the 1997 plan had continuing constitutional defects, but forthrightly they pointed out that "due to their lack of standing, any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing."

The subsequent memorandum opinion entered by the district court on September 12, 1997 approved the plan but specifically stated:

[W]e close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not—cannot—run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

In October 1997, the district court dissolved the stay order entered previously in the Cromartie action; and an amended complaint was filed, which added plaintiffs from the Twelfth District and additional plaintiffs from the First District. The state defendants obtained a short extension of time to answer and filed a motion in *Shaw v. Hunt* to consolidate with it the action that had been filed by Cromartie, as well as a different action, *Daly v. High*, No. 5:97-CV-750-BO (E.D.N.C.), which challenged both North Carolina's redistricting plan and its legislative reapportionment. This motion was denied by the *Shaw* three-judge court.

On January 15, 1998 Cromartie's action was assigned to the three-judge district court which was considering the *Daly* case.¹¹ Thereafter, the court proceeded quickly to hear conflicting motions for summary judgment filed by the Cromartie plaintiffs and the State defendants. The court rendered summary judgment against the defendants and enjoined use of the 1997 redistricting plan in the 1998 primaries and elections. The defendants unsuccessfully sought a stay order from the district court and then appealed its denial of a stay to the Supreme Court, which also denied their application for a stay.¹² The defendants subsequently applied fruitlessly to the district court for leave to conduct primary elections under the 1997 plan in six congressional districts in eastern North Carolina that had been created by that plan. Thereafter they perfected their appeal to the Supreme Court.

C. The 1998 Redistricting Plan

The district court had allowed the General Assembly until May 22, 1998 to submit a redistricting plan for the 1998 elections. On May 21, 1998, a plan was enacted which left the First District as it had been drawn in 1997, but modified the Twelfth District. The plaintiffs filed their objections to the 1998 plan within the three day period allotted by the district court, and the state defendants responded in a like period. Subsequently, the plan was precleared by the Department of Justice; and then, on June 22, 1998, it was approved by the three-judge district court for use in the 1998 elections. However, the court noted that as to the First District neither the plaintiffs' motion for summary judgment nor that of the defendants had been granted. Therefore a trial would be necessary. Moreover, at trial the plaintiffs could

¹⁰ Moreover, unlike the 1992 plan, Durham County was not divided and was placed in a geographically compact District 4.

¹¹ Until that time the *Cromartie* action had been pending before District Judge Malcolm Howard, and no three-judge panel had been designated. The panel for *Daly* had been designated previously.

¹² See *Cromartie v. Hunt*, 118 S. Ct. 1510 (1998) (Stevens, Ginsburg, and Breyer, JJ., dissenting).

offer further evidence as to the racial motive for the Twelfth District. Pursuant to 28 U.S.C. § 1253, the plaintiffs appealed from the district court's denial of their requested injunction.

D. The Hunt v. Cromartie Appeal

The law enacting the State's 1998 plan provided that the State would revert to the 1997 districting plan if the Supreme Court ruled favorably upon the State's appeal. See 1998 N.C. Sess. Law, ch. 2, sec. 1.1. This provision was undoubtedly included by the General Assembly in order to assure that the state's appeal of the lower court's adverse ruling as to the 1997 plan would not be dismissed for mootness. Ironically, because of this provision the legislature also assured that if its appeal were successful, the elections in the year 2000 would be conducted under a plan that had never been used before and that, consequently, the members of Congress elected in 1998 would undergo a further change in districts.¹³

The Supreme Court noted probable jurisdiction with respect to the state's appeal. Therefore, the parties agreed to stay the discovery proceedings that had been scheduled by the district court in preparation for a trial as to the legality of the 1998 plan. The plaintiffs also had filed an appeal from the judgment upholding the 1998 plan, but the Supreme Court took no action thereon—apparently to await the decision on the state's appeal. The state's appeal was supported by various *amici curiae*, including the United States, and some of the *amici* urged the Supreme Court to overrule or severely limit *Shaw v. Reno*.

On January 20, 1999, oral argument took place; and the decision was handed down on May 17, 1999. All nine justices agreed that the summary judgment entered by the district court should be reversed. However, there was no unanimous opinion. Justice Thomas delivered the opinion of the Court, in which he was joined by Justice O'Connor (who had authored the opinion of the Court in *Shaw v. Reno*), Chief Justice Rehnquist (who had authored the opinion of the Court in *Shaw v. Hunt*), and Justices Scalia and Kennedy. These five justices had also joined in both *Shaw* opinions. Justice Stevens wrote the opinion concurring in the judgment; and he and two of the other three justices who joined therein had dissented in *Shaw v. Reno*.¹⁴

The opinion of the Court points out that "[t]he task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as maybe available.'" Citing *Arlington Heights*, 429 U.S. 252 (1977). Because districting legislation ordinarily is race-neutral on its face, the plaintiffs were required to prove that District 12—which the lower court had held unconstitutional—was "drawn with an impermissible racial motive." "To carry their burden, appellees were obliged to show—using direct or circumstantial evidence, or a combination of both . . . —that 'the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.'"

The plaintiffs had "offered only circumstantial evidence in support of their claim"; but, in the Court's view, their "evidence tends to support an inference that the State drew its district lines with an impermissible racial motive—even though they presented no direct evidence of intent." However, "the legislature's motivation is itself a factual question"; and because the state had presented some evidence that supported a political explanation "at least as well as and somewhat better than a racial explanation," the court concluded that summary judgment was inappropriate. The four justices who concurred in the judgment apparently were unwilling to concede that the circumstantial evidence even raised an inference of racial motive.

A week after its decision in *Hunt v. Cromartie*, the Supreme Court also vacated the judgment that had been rendered as to the 1998 plan and remanded to the lower court for consideration in light of the Supreme Court's opinion. Thus, at the present time, the parties are awaiting a trial as to the legality of the 1997 plan—a plan that has never been used in an election. In the 1997 plan, the Twelfth District is almost 47% African-American in population; it includes parts of six counties and contains most of the predominantly black precincts in Charlotte, Winston-Salem, Greensboro and High Point.¹⁵ The First District, which was the same in both

¹³ Heretofore, I have been criticized extensively for creating confusion as to congressional districts; and so, to me it seems somewhat ironic that the State, in this instance, generated potential confusion as to what plan will be used in the 2000 elections.

¹⁴ Justice Ginsberg was not on the Court at the time of *Shaw v. Reno*, although it appears very probable that she would have dissented in that case as well.

¹⁵ In the 1998 plan, the Twelfth District was only about 35% African-American in population, had only five counties—one of which was not split, and excluded Greensboro.

the 1997 and 1998 plans, is majority-black and is in the northeastern part of the State.

E. Racial Gerrymanders in Other States

The situation in North Carolina—where the attack on racial gerrymanders commenced—is in stark contrast to that in several other states which have experienced similar litigation. For example, in Louisiana, the three-judge district court twice invalidated a racially gerrymandered redistricting plan and its “Mark of Zorro” District; finally the court developed a plan which the State legislature adopted and thereby mooted a pending court challenge. In Georgia, two majority-black districts—one of them the “March to the Sea” district running from Atlanta to Savannah—were overturned by the district court, which ultimately developed a new plan. In Texas, four racially gerrymandered districts were overturned and a new plan was developed by the district court.¹⁶ In that plan, thirteen districts had to be reconfigured to eliminate the effects of the gerrymander. In Virginia, a racially gerrymandered district was successfully attacked; and even in New York a three-judge district court invalidated such a district.

Contrary to the dire predictions of the persons who had been elected to Congress from racially-gerrymandered districts, they were reelected in redrawn districts which were not gerrymandered.¹⁷ Proponents of racially gerrymandered districts insist that in these instances reelection was the result of incumbency—which could have been attained only in racially gerrymandered districts. This contention, however, remains unproved.

F. What Lies Ahead

In North Carolina, a trial is in the offing—probably in the fall of 1999—to determine the legality of the redistricting plan enacted in 1997. The plaintiffs will contend—as they have from the outset—that circumstantial evidence fully demonstrates the predominantly race-based motive for the creation of the First and Twelfth Districts. As to the First, plaintiffs will argue that it is impossible to create a geographically majority-black district in North Carolina.¹⁸ Therefore, the circumstance that the First District is majority-black, when considered in connection with the District's splitting of many cities and counties—is a good indicator of a racial motive. In this instance, the motive to create a race-based district was based on an erroneous assumption that a majority-black geographically compact district could be created and the Justice Department's insistence on creating the district.

With respect to the Twelfth District, the issue now appears to be whether a racial or political motive predominated in the District's creation. Because in North Carolina over 95% of African-American registered voters both register and vote as Democrats, the difficulty in determining motive is increased. Obviously, the defendants hope to take advantage of that difficulty. The plaintiffs will rely principally on the shape and demographics of the District to establish that it is a racial gerrymander; but they also expect to present some additional evidence to prove the race-based motive.

Only one more election will occur before the next census requires drawing new districts for North Carolina—one of the nation's most rapidly growing states. Why then is it worth the trouble of having another trial?¹⁹ For one thing, four elections under unconstitutional plans are enough. Citizen confidence in the electoral process requires that racial gerrymandering in North Carolina be brought to an end without further delay. Secondly, unless attacked successfully at this time, there is the risk that the current plan will form the baseline for post-census plans. The Supreme Court has ruled that in drawing a new plan a legislature should not rely on an earlier unconstitutional plan. Invalidating the present unconstitutional plan gives greater assurance that this plan will not be used—whether openly or sub rosa—to draw congressional districts for the next decade.

The North Carolina litigation may finally dispose of several issues. For example, when the legislature was drawing its 1997 plan, it was informed by the Chair of the Senate Redistricting Committee of his understanding that *Shaw* applied only to majority-minority districts. This information seems at odds with the logic of *Shaw*

¹⁶ Governor Bush declined to call the Texas legislature into a special session to develop a new redistricting plan; and thereby he assured that the new plan would be drawn by the three-judge court which had invalidated the racially gerrymandered plan.

¹⁷ In Louisiana, Cleo Fields, an African-American, did not run for reelection. Instead, he ran for election as governor.

¹⁸ Strong evidence indicates that this is true whether the criterion used is majority of total population or instead is majority of voting age population.

¹⁹ Some have accused me of having an obsession with the redistricting issue. If an obsession with seeking compliance with the Constitution is a crime, I must plead guilty.

v. *Reno*; and in its appeal to the Supreme Court in *Hunt v. Cromartie*, the State did not put forward such a contention. The failure of any of the Justices to even mention such a contention in the *Hunt v. Cromartie* opinions strongly suggests that *Shaw* is not limited to majority-minority districts; nor is there any reason in Equal Protection jurisprudence that it should be limited in this manner.

In *Hunt v. Cromartie*, the plaintiffs have urged that for remedial districts—namely, districts created to replace racially gerrymandered districts—the legislature must eliminate all “vestiges” of the gerrymander.²⁰ This argument was not discussed in *Hunt v. Cromartie*. Likewise, the Court did not address the plaintiffs’ contention that requiring them to prove that race was the legislature’s “predominant motive” would impose on them an evidentiary burden greater than is called for by well-entrenched equal protection precedents like *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Some have concluded that the failure of the Supreme Court to discuss these contentions in deciding *Hunt v. Cromartie* signifies their rejection. Plaintiffs respond that such issues were not directly before the Court and that no inference can be drawn from the failure to discuss. On the other hand, the failure of the Court even to mention the arguments by some of the amici that *Shaw v. Reno* should be overruled or severely limited does seem significant.

G. A Possible Solution

Opponents of racial gerrymandering have insisted that those gerrymanders defeat the purpose of having single-member electoral districts—rather than having all candidates run at large. Some opponents suggest that, instead of gerrymanders, multi-member districts with proportional representation are the best solution. This, at least, would reduce the inconsistency of the present system, which attempts to impose a quota system on single-member districts.

To me a more attractive solution is the creation of independent Redistricting Commissions to perform redistricting without regard to race, party or incumbency. New Jersey and several other states already have redistricting commissions of some type. A bill to amend the North Carolina Constitution along these lines has been introduced in the State Senate. The Redistricting Commission, as proposed by this bill, would consist of nine persons—two appointed by the Chief Justice of the North Carolina Supreme Court “with no more than one affiliated with the same political party”; three appointed by the governor “with no more than two affiliated with the same political party”; two appointed by the Speaker of the House of Representatives “with no more than one affiliated with the same political party”; and two appointed by the President Pro Tempore of the Senate “with no more than one affiliated with the same political party.” “No person may serve on the Commission who has held elective public office or been a candidate for elective public office in the four years prior to commencement of service” on the Commission and “[n]o person who has served as a member of the Independent Redistricting Commission shall be eligible to hold any elective public office for four years after termination of service.” The districts created are to be “compact and contiguous.” Of special significance is the requirement that “[i]n preparing or adopting its plans, the Independent Redistricting Commission shall not consider the following information: (a) the political affiliation of voters; (b) Voting data from previous elections; (c) The location of incumbents’ residences; or (d) Demographic data from sources other than the United States Bureau of the Census.”

Under the bill introduced to the North Carolina Senate, the plans developed by the Independent Redistricting Commission take effect directly and do not require approval by the General Assembly. Another alternative would be to have the Commission’s plan submitted to the legislature for an up or down vote without opportunity for modification—as has been done at the federal level in connection with plans for base closures developed by the Base Closure Commission. In any event, the Commission would be a step forward from the present system in which legislators choose the voters to be in their districts, rather than having the voters make the choice. Enhanced voter confidence would be generated.

I understand that both the League of Women Voters and Common Cause are supporting the bill that has been submitted in North Carolina. Despite this support, any such bill will encounter considerable opposition. Undoubtedly, legislators will be reluctant to establish such commissions because doing so implies that they cannot fairly and impartially draw electoral districts. Because of such reluctance, it will be

²⁰ A precedent is provided by the cases requiring removal of all “vestiges” of racial segregation in the public schools. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979). A precedent is also provided by criminal procedure cases involving the “fruit of the poisonous tree.” See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979).

difficult to get the General Assembly to allow a referendum by the voters on the desirability of creating an Independent Redistricting Commission. However, if the voters were allowed to vote on such a proposal, the chances of success seem great in light of voter cynicism about the present process and the resentment against gerrymanders, both political and racial, and against efforts to entrench incumbents.

In some states, such as California, the bottleneck of the legislature can be avoided by use of an initiative to place on the ballot a referendum for change in the state constitution. I hope—and even anticipate—that the initiative will be used as a means to give the voters an opportunity to vote on the creation of independent redistricting commissions. Perhaps in this way, a groundswell will be created that will assure that in the elections in the year 2002, the use of racial gerrymanders is minimized.

Conclusion

The road to the elimination of racial gerrymanders has been long indeed; however, I believe that it is important that this road be traveled to the end. Only then will the goal of Equal Protection in the electoral process be attained.

Mr. CANADY. Ms. Hodgkiss.

STATEMENT OF ANITA HODGKISS, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Ms. HODGKISS. Mr. Chairman and members of the subcommittee, my name is Anita Hodgkiss. I am a Deputy Assistant Attorney General in the Civil Rights Division at the Department of Justice. Thank you very much for the opportunity to participate in today's hearing.

The Department of Justice supports H.R. 1173 because it would be a valuable way to give State legislatures additional flexibility in their redistricting process. However, we can only support this bill if it includes, as it does now, the requirement that any multi-member congressional district system must comply with the Voting Rights Act. Without that explicit requirement, we would not support this proposal.

I have submitted written testimony which I request be made part of the record.

Mr. CANADY. Without objection, it has already been made a part of the record.

Ms. HODGKISS. Thank you.

I would like to focus on two points: first, why the bill is helpful; and, second, if the bill is enacted, the standards under the Voting Rights Act that the Department of Justice would apply to any congressional redistricting plans that States adopt using multi-member districts.

On the first point, it is the Department's view that this bill is helpful because it gives State legislatures more options. Redistricting is universally recognized as one of the most complex tasks a legislature ever undertakes. Routinely, the competing interests at stake include, for example, protecting incumbents, obtaining a particular partisan balance, recognizing regional communities of interest, and respecting existing political subdivisions such as precinct lines and county boundaries.

On top of these competing interests are the legal standards which govern redistricting, such as the one person, one vote requirement. For congressional districts, that requirement is particularly onerous because the Supreme Court has held that the Con-

stitution requires congressional districts to be virtually identical in population.

In addition, States are facing controversial issues concerning the census data itself, including the use of sampling and tabulating multi-racial respondents.

This bill is helpful because it will allow States to consider using multi-member districts. Such an option may make it easier to follow county lines or to keep together a region of the State that has similar interests, a farming area, for example, or Silicon Valley. Basically, when State legislatures are trying to decide which of the myriad competing interests to recognize and to what extent, having the option of multi-member districts would be valuable to them. Now is a good time to give State legislatures additional flexibility.

It is worth noting, however, that nothing in this bill detracts from the legitimacy and validity of using single-member districts to provide geographic representation or to remedy potential vote dilution problems. This bill seeks to add to a State's options without limiting or invalidating their current choices.

With regard to the Voting Rights Act, it may be useful for me to briefly explain the standards that the Department of Justice currently uses and how those standards would apply to multi-member districts.

In any State that makes use of the opportunity to have multi-member congressional districts, the Department of Justice has available primarily two law enforcement tools to ensure that such districts are fair to minority voters, section 2 and Section 5 of the Voting Rights Act.

Section 2 applies to the entire country. We would examine any multi-member congressional district that is enacted anywhere in the country to make sure that it does not dilute the votes of minority voters. A multi-member congressional district in a State where voting is racially polarized would violate Section 2 if the State fails to use alternative election methods such as cumulative or limited voting where those methods would give minority voters an equal opportunity to elect candidates of choice. In regions where there are several politically cohesive minority populations, we would examine the implications of the multi-member districts' system for each population.

Section 5 of the Voting Rights Act applies to all or portions of 16 States. Covered jurisdictions must submit their redistricting plans to us or to the D.C. District Court for preclearance before they can become effective.

Under Section 5, we would examine multi-member congressional districts applying two tests: First, does the change have a discriminatory purpose; and, second, does it have a retrogressive impact on the ability of minority voters to participate in the political process. We would take into account all of the circumstances surrounding elections in the affected State or region as well as the legislative history of the redistricting proposal itself.

In examining discriminatory purpose, we apply the Arlington Heights factors. One of those factors is the impact of the official action, whether it bears more heavily on one race or another. In this context, if we find that an alternative arrangement would have provided politically cohesive minority voters an opportunity to elect a

candidate of choice and the States' multi-member district system does not, under the current standards that apply to our Section 5 review, that would be some evidence of discriminatory intent. In looking at whether the States' multi-member district proposal is retrogressive, we would compare the opportunity minority voters have to elect candidates of choice in the current single-member districts with what opportunity they would have under the proposed multi-member district system.

In conclusion, the Department of Justice continues to be committed to its responsibility to uphold the principles of the Voting Rights Act. Because this legislation is consistent with those principles, we support it.

Thank you for this opportunity to share our views.

Mr. CANADY. Thank you, Ms. Hodgkiss.

[The prepared statement of Ms. Hodgkiss follows:]

PREPARED STATEMENT OF ANITA HODGKISS, DEPUTY ASSISTANT ATTORNEY GENERAL,
CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

My name is Anita Hodgkiss. I am a Deputy Assistant Attorney General in the Civil Rights Division at the Department of Justice.

First, I want to thank you for the opportunity to participate in today's hearing to discuss the views of the Department of Justice on H.R. 1173, the States' Choice of Voting Systems Act. The Department of Justice supports this legislation as a valuable way to give state legislatures additional flexibility in the redistricting process. However, that support absolutely depends on the bill containing the explicit requirement that any multi-member congressional districts must comply with the Voting Rights Act.

Single-member districts have long been a successful and crucial remedy for vote dilution under Section 2 of the Voting Rights Act. Indeed, single-member congressional districts have been described as a "vital, essential, and integral part of the concept of equality of representation and responsiveness of government in the Federal House of Representatives." 113 Cong. Rec. 34365 (1967) (statement of Sen. Baker). If enacted, H.R. 1173 would remove the current federal law requirement that states utilize single member Congressional districts; instead, it permits states to use other districting models, including at-large systems and multi-member districts.

Giving states greater flexibility in the redistricting process is an important objective. Redistricting is one of the most difficult and complex jobs that a state legislature ever undertakes. The process brings into play a huge number of variable criteria: the one person, one vote requirement of the U.S. Constitution; the Voting Rights Act's requirement that the votes of racial and language minorities not be diluted; the concerns of incumbent officeholders and the needs of diverse constituencies; geography and population distribution; state laws and policies that constrain the legislature's choices; and a host of other political, social, and economic interests and realities.

The post-2000 redistricting process will be further complicated by new challenges, including uncertainty caused by the *Shaw* line of Supreme Court cases, as well as questions about the 2000 Census itself. The legislation this subcommittee considers today would put more tools in the hands of state officials, should they choose to use them, as they engage in the very difficult task of Congressional redistricting.

While we support increasing options for state legislators, the Department of Justice's chief concern about this or any redistricting legislation is the impact it could have on our enforcement of the Voting Rights Act of 1965.

The Voting Rights Act of 1965 protects every American against racial discrimination in voting. This law also protects the voting rights of people who have limited English skills. The Voting Rights Act stands for the principle that everyone's vote is equal, and that neither race nor language should shut any person out of the political process.

Section 2 of the Voting Rights Act prohibits the use, by any state or local government, of election processes or procedures that discriminate on the basis of race, color, or membership in a language minority group. Section 2 prohibits not only voting practices or procedures that are intended to be racially discriminatory, but also

those that are found to have the effect of denying minority voters an equal opportunity to elect their candidates of choice to office. See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Suits can be brought under Section 2 by either the Justice Department or a private citizen.

Section 5 of the Act is only applicable to designated states and local governments within the country, as set out in the regulations implementing the Act. It requires these designated state and local governments to get federal approval (known as "preclearance") prior to implementing any changes to their voting procedures—anything from a change in the method of election to a change in the voting district lines. Under Section 5, a covered state, county, or local entity must demonstrate to federal authorities that the voting change in question (1) does not have a racially discriminatory purpose; and (2) will not make minority voters worse off than they were prior to the change (*i.e.*, will not be "retrogressive").

While the text of H.R. 1173 does not limit states to any particular voting system, we are pleased that it does provide that whatever system a state adopts must comply with the Voting Rights Act. I want to stress that the Department's support of this legislation depends on that explicit requirement. It is imperative that any such districting scheme for a state's congressional delegation be designed in such a way that it does not dilute the voting strength of minority voters in the state.

Moreover, it is important to emphasize that H.R. 1173 does not undermine nor otherwise cast doubt on the validity of single-member districts as a remedy for vote dilution under Section 2 of the Voting Rights Act.

The wisdom of this bill's requirement that multi-member districts comply with the Voting Rights Act is further supported by the legislative history of the 1967 Act which H.R. 1173 amends. An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting, Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. §2c, (1997)). Congress had two reasons for enacting this requirement in 1967. First, there was concern that following the Supreme Court's one-person, one-vote decisions in *Baker v. Carr*, 396 U.S. 186 (1962) and *Wesberry v. Sanders*, 376 U.S. 1 (1964), courts may order a state's entire congressional delegation to run at-large in states where the legislature could not agree on a redistricting plan, a result many found threatening. Second, the law was intended to prevent states from using at-large elections to dilute minority voting strength. Senator Howard Baker, for example, argued that the law was necessary in order to provide representation for ethnic groups that "may have not voice at all if the election is on an at-large basis." 113 Cong. Rec. 34365 (1967). Thus, H.R. 1173 preserves the original intent of the statute it amends by permitting but not requiring states to use multi-member districts and by incorporating the requirement that multi-member districts must comply with the Voting Rights Act.

Permitting the use of multi-member districts for congressional elections does raise significant concerns about how these districts would be evaluated under the Voting Rights Act. To address those concerns, the bill appears to contemplate the use of alternative voting systems for multi-member districts. These systems would replace the traditional "winner-take-all" method of vote counting with other means, such as cumulative voting, limited voting, and preference voting (also referred to as a single transferable vote system). These methods are designed to allow fuller expression of the votes of cohesive numerical minorities of every kind, whether racial or otherwise.

The text of this legislation specifies that "each state may establish" multi-member districts for electing members of Congress. One question that has arisen with regard to multi-member districts using limited or cumulative voting at the local level is whether a court may order the use of such a system to remedy voting rights violations. The spirit and intent of this bill appears to be that state legislatures should have the option of using multi-member districts with alternative election methods that allow minority representation, and it is less clear whether such measures could be ordered by a court absent a definitive indication from the state that it favored using such a system.

The experience with multi-member districts using cumulative, limited or preference voting for local governing bodies such as school boards or county commissions has been that where a court is evaluating multi-member districts as remedies for vote dilution, it is important to examine carefully whether the limited voting, cumulative voting, or single transferrable vote system will provide minority voters an equal opportunity to elect candidates of their choice. Studies of the outcomes of cumulative voting elections adopted by jurisdictions around the country to resolve Voting Rights Act claims reveal that they have been effective in removing barriers to electoral participation. See Robert R. Brischetto & Richard L. Engstrom, *Is Cumulative voting Too Complex? Evidence From Exit Polls*, 27 Stetson L. Rev. 813, 816-

17 & n. 25 (1998); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 272-276 (1995).

Similarly, when the Justice Department reviews multi-member or at-large districts where cumulative or limited voting is used, under Section 5 of the Voting Rights Act, we apply the non-retrogression standard by evaluating whether minority voters would have less opportunity to elect candidates of choice under the new system than they had previously.

Since 1980, the Civil Rights Division has received and evaluated more than 50 submissions of cumulative voting systems and approximately 13 of limited voting systems. Most were precleared. The Division has interposed an objection only once to a limited voting system: in 1997 the state of New York passed legislation that would have changed the method of election for members of New York City school boards from the single transferrable voting system (STV) to limited voting. We concluded that a change from STV to limited voting would make minority voters in the covered counties in NYC worse off.

The Division has interposed an objection to only two cumulative voting schemes. In 1994, we objected to a submission of a cumulative voting system by the city of Morton, Texas, because the city had not adequately explained the new system to minority Hispanic voters. We subsequently precleared the cumulative voting system when it was accompanied by an adequate voter education program. In 1995, we objected to a submission of cumulative voting from the city of Andrews, Texas. In this case, the cumulative voting system being adopted also included numbered posts, which appeared to us to defeat the purpose of using cumulative voting. We ultimately consented on other grounds to the use of the system as proposed by the city.

The lesson to be drawn from our experience with Section 5 review of limited and cumulative voting systems for local governing bodies is that a careful examination must be made of all the circumstances of a proposed election system to determine whether it will afford minority voters an equal opportunity to participate in the election process. A system that fails to include sufficient community outreach to educate voters about the new election method, or, as in New York, makes it more difficult for minority-supported candidates to be elected, is likely to be retrogressive and therefore a violation of Section 5 of the Voting Rights Act.

In addition, if this bill were enacted, legislatures and possibly courts would be required to examine whether the use of an alternative voting system is necessary in order for a multi-member districting scheme to be consistent with Section 2 of the Voting Rights Act, which applies throughout the country and requires that the voting strength of minority voters not be diluted. A multi-member district by itself, without the use of an alternative election method, is dilutive where an alternative election method could be devised that would allow a politically cohesive minority population to elect candidates of choice.

Finally, I also want to note that under this bill, states covered by the preclearance provisions of Section 5 of the Voting Rights Act will continue to have the burden of demonstrating, either to the Attorney General or to the D.C. District court, that their proposed Congressional redistricting plans were not enacted with a purpose to discriminate against minority voters as well as showing they will not have the effect of making minority voters worse off under the retrogression standard I mentioned earlier.

We take seriously our administrative review and enforcement responsibilities under the Voting Rights Act. The continued vitality of the Act, and repeated Congressional affirmations of its importance, are indispensable bulwarks against racial discrimination in voting across the nation.

Again, thank you for this opportunity to share our views. I will be happy to answer any questions the members of the Subcommittee may have.

Mr. CANADY. Ms. Thernstrom.

STATEMENT OF ABIGAIL M. THERNSTROM, SENIOR FELLOW, THE MANHATTAN INSTITUTE, NEW YORK

Ms. THERNSTROM. Thank you for inviting me today.

Frankly, I can hardly believe we are talking about political jurisdictions having a choice about their method of electing members to Congress. Not so long ago, the last time I knew, civil rights groups had maps on their walls indicating every corner of the Nation in which at-large voting or multi-member districts still were used. Only single-member districts were considered non-discriminatory

since the lines of such districts could be drawn carefully to ensure maximum black and Hispanic officeholding.

Clearly, however, principles are malleable, interests are enduring, and as black and Hispanic voters have become more residentially dispersed, making safe minority constituencies harder to create, and as the Supreme Court has come to express doubts about the constitutionality of a race-driven districting, the old principles have simply been abandoned without explanation.

States should have a choice, it is now said, although yesterday such choice was thought to give a free hand to white racists who would deny black voters and Hispanic voters equal electoral opportunity. Both Ms. Clayton and Mr. Watt were elected under precisely the circumstances that were the staple of civil rights dreams. They won with substantial majorities in districts allegedly too white to elect any black candidates. They did so, of course, by putting together a biracial coalition.

Ms. Clayton and Mr. Watt are our civil rights dream come true, blacks and whites together; and yet they want to change the system under which they themselves were elected. And do not tell me that they had such substantial white support because they were incumbents. They were not incumbents in the districts in which they were forced to run after Supreme Court rulings.

Mr. Watt said this morning that racial polarization is the result of single-member districting. But, of course, the Supreme Court talked about polarization only in the context of race-driven districting, not in the context of single-member districts per se. And, in any case, in my view, the argument is positively weird. The single-member districts from which they successfully ran brought voters across the racial divide together, which is becoming an increasingly familiar American story.

Mr. Watt referred to the disfranchisement of voters who cast ballots for losing candidates. By that measure, I am continually disfranchised when I vote for representatives from Massachusetts. I am always voting for the losing candidate. That is called the American system.

Mr. Watt and Ms. Clayton talk about giving States a choice between methods of voting, but if the Justice Department and the civil rights attorneys come to decide that a single-member districting system dilutes black votes, multi-member districts will (in that particular setting) become not a choice but a mandate, and by the Department of Justice's standards all voting in America is racially polarized. The last time I looked, they had not found a jurisdiction—I may be out of date—in which voting was not polarized.

From multi-member districts, as several people have said today, the next step will be cumulative voting. In the airport this morning, I happened to bump into an old acquaintance from Israel. When I told her that some Members of Congress were flirting with cumulative voting or proportional representation, she said, are they crazy? Look at Israel. Here in America we will end up with a David Duke party, a Pat Buchanan party, an Al Sharpton party, you name it.

The extremists will have a field day as they jerk the whole system around. Governing will become harder, not easier. And the

purpose of an electoral system, the last I knew, was to produce officials who could govern.

This bill will not improve democracy, Mr. Watt's assertions to the contrary notwithstanding.

Mr. Chairman and members of the committee, if it ain't broke, don't fix it.

Thank you very much.

Mr. CANADY. Thank you, Ms. Thernstrom.

[The prepared statement of Ms. Thernstrom follows:]

PREPARED STATEMENT OF ABIGAIL M. THERNSTROM, SENIOR FELLOW, THE
MANHATTAN INSTITUTE, NEW YORK

Mr. Chairman, I very much appreciate the invitation to testify today. My name is Abigail Thernstrom. I hold a Ph.D. from the Department of Government, Harvard University, and am currently a senior fellow at the Manhattan Institute in New York, a member of the Massachusetts state board of education, and the co-author of *America in Black and White: One Nation, Indivisible*. My earlier work, *Whose Votes Count? Affirmative Action and Minority Voting Rights* won four academic prizes, including awards from the American Bar Association and from the Policy Studies Organization (an affiliate of the American Political Science Association), which named it the best policy studies book published in 1987.

Here are my thoughts on the proposal to allow states to use districting systems other than single-member districts to elect representatives to Congress.

The current system works well. If it ain't broke, don't fix it.

Mr. Watt and Ms. Clayton argue, of course, that repair is, in fact, needed—that states should not be forced to elect members of Congress exclusively from single-member districts. The process of congressional redistricting involves many disruptions and much uncertainty, they argue. But where political interests are at stake, that is inevitable. They point to the costs of litigation, but those costs have been the consequence of attempts to draw ludicrously gerrymandered districts in an effort to create a maximum number of safe black seats. That expense, in other words, was a self-inflicted wound. Now that such race-driven redistricting has been ruled unconstitutional, the legal expenses associated with line-drawing should go down.

Mr. Watt and Ms. Clayton also suggest that increased racial polarization is the price America pays for single-member districts. The attempt to draw such districts in such a manner as to give minority voters a chance to elect the "representatives of their choice . . . has heightened racial divisions." This is a difficult argument to understand. The Supreme Court forced North Carolina to redraw Congressman Watt's district, and its black population dropped from 57 percent to 36 percent. With a majority-white constituency, Mr. Watt was compelled to forge a biracial coalition. Such coalitions do not increase racial polarization; they reduce it. Any system of elections that encourages biracial or multi-ethnic coalitions is a plus. America is still too racially divided; every device that brings us together should receive a very warm welcome.

In addition, the black voters in the first and twelfth districts of North Carolina have not been deprived of a "chance" to elect the representatives of their choice. Indeed, the only time black voters have *no chance* to elect the representatives of their choice (who may be white, of course) is when whites are a majority and refuse to support anyone who can pick up black votes. In an earlier era, there were such settings. But America has changed—as is so well illustrated by the victories of Mr. Watt and Ms. Clayton. In 1998, in his 36 percent black district, Mr. Watt won with 56 percent of the vote. Sixty-two percent of the voters cast their ballots for Ms. Clayton in her 50 percent white district. They will undoubtedly argue that they had an enormous advantage as incumbents, but they were not incumbents in the newly-drawn districts in which they had to run.

Doors are wide open to black candidacies today; everyone knows Colin Powell would have had massive white support had he chosen to run for the presidency. In 1999 our problem is not bigoted white voters (a relatively small minority), but a paucity of black candidates willing to test the biracial electoral waters. If Mr. Watt and Ms. Clayton are serious about wanting to narrow the racial divide, they should encourage other potential African American candidates to build biracial or multiethnic coalitions in settings that are not safely majority-black.

Increasingly, that will become essential. Black voters are becoming more residentially dispersed. Over 30 percent now live in suburbia; segregation is down in central cities as well—contrary to conventional wisdom. The proposed legislation would

undercut the incentives currently built into the single-member system to form such biracial and multiethnic coalitions—incentives that will grow stronger as black voters become less residentially concentrated.

With demographic change, Mr. Watt and Ms. Clayton may worry that safe black seats—majority black constituencies—will be harder to create. And they may believe that multimember districts will better allow the perpetuation of racial gerrymandering to maximize black officeholding. Indeed, race-conscious line drawing is not confined to single-member districts; racial considerations can play a dominant role in setting the contours of, say, the three multimember districts that a particular state might contain. But such gerrymandering is not in the interest of either white or black voters.

In a series of recent voting rights decisions that was precisely the Supreme Court's point. Such gerrymandering is not in the public interest. As Justice O'Connor put it in *Shaw v. Reno*, contours obviously drawn with race in mind suggest racial stereotyping. They reinforce "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." In other words, individuals—not races—differ. Assume otherwise, O'Connor suggested, and racial lines are likely to harden.

Such racial gerrymandering is not in the public interest, but if the voting rights section of the U.S. Department of Justice continues to believe that the Voting Rights Act is an instrument with which to maximize black officeholding (reflecting the conventional wisdom in the civil rights community), then race-conscious multimember districting will most likely be transformed from a mere option—as advertised—to a full-blown entitlement on the theory that anything less would "dilute" the black vote. And thus single-member districts won't even be a choice in those states in which multi-member districting is advantageous to black congressional candidates.

Suppose the consequence of leaving the current system unchanged is a disproportionately low number of blacks and Hispanics in Congress. That is, suppose the black membership in Congress does not reflect precisely the black proportion of the U.S. population. (Indeed, as long as almost all African American members of Congress are Democrats, the black proportion will reflect Democratic Party strength rather than the black presence in the American population as a whole.) Is there something wrong with black underrepresentation by the measure of proportionality?

To begin with, answering, yes, assumes that only black officeholders can represent black interests. And yet would anyone argue that only whites can represent white interests? Such an assertion would correctly be viewed as racist.

In addition, the purpose of an electoral system is not to mirror the population precisely, but to produce officials who can govern. The current system not only creates incentives for reaching across racial and ethnic lines during campaigns, but also forces compromise among various political factions. From multimember districts, the next step will be to cumulative voting, which will encourage a multiplicity of parties, some of which will be racially defined. There will be a David Duke party and a black nationalist party, and blacks and whites will both be the losers. In order to govern, representatives from a variety of warring parties will have to create shifting coalitions, but such temporary post-election alliances will inject instability into a system that now works well.

Congress banned at-large elections for congressional seats in 1967, but the preference for single-member districts actually stretches back much further. Moreover, at the state level there has been a dramatic decline in the use of multimember seats, largely as a consequence of actual or threatened civil rights litigation. (In 1962, 41 lower houses used some multimember districts; by the mid-1990s, the number was 12; for state senates, the number dropped from 30 to 4.) Civil rights groups have long regarded at-large voting and multimember districts with the deepest suspicion, and with litigation, threats of litigation, and a cooperative Justice Department have forced the adoption of single-member districts for elections at the state and local level across the nation. Maps were drawn, jurisdictions with at-large and multimember districts were targeted, and a sustained campaign to bring them all down was launched.

The reasoning behind that campaign was clear: Where black voters are residentially concentrated, such single-member can be carefully drawn to create absolutely safe black legislative seats. But for those of us who lived through this history, today's sudden change in sentiment—embodied in this bill—is simply incredible. A vital component of civil rights orthodoxy has been abandoned without so much as a pretense of an explanation. If multimember districts and at-large voting are okay for Congress, are such electoral arrangements now equally acceptable in the Mississippi counties from which they were banned by the Supreme Court in its 1969 landmark decision? Can other counties and cities return to at-large elections? What

is the principle here? Last I knew, even the Supreme Court had directed lower courts who imposing redistricting plans to use single-member districts.

The smaller districts that the civil rights community has insisted upon have reduced the costs of campaigning, and have thus encouraged candidates with limited financial resources. Cumulative voting might solve the latter problem, but it carries with it other serious difficulties, as already suggested. Some of the problems are quite technical. For instance, could residents of a multimember district expect a member of Congress within that large district to represent everyone, or would constituency services be available only to that small minority of citizens (organized perhaps in a splinter party) who provided the needed votes? In any case, if proponents of this bill want cumulative voting, they should say so directly.

In short, Mr. Watt and Ms. Clayton were elected under precisely the circumstances that have been the staple of civil rights dreams. And they should celebrate the gains that America has made. They are black officeholders elected with substantial white support. A new chapter in American history has opened; Congress should not be tempted to close the book when the story has finally become so heartening.

Mr. CANADY. Mr. Watt.

Mr. WATT. I thank Ms. Thernstrom for that rousing—

Ms. THERNSTROM. You can count on me for that.

Mr. WATT [continuing]. Endorsement of the bill, first.

Let me just start by correcting her. I have never said that single-member districts result in polarization. What I have said is people keep telling me that.

Ms. THERNSTROM. Tell them it is not true.

Mr. WATT. Well, I don't know whether it is true or not.

I do know that, in Massachusetts, if you had multi-member districts or if you had cumulative voting in multi-member districts, you might have the opportunity to elect a representative of your choice, whereas right now you say you are a voice in the wilderness and disenfranchised.

Ms. THERNSTROM. I don't say I am disfranchised. By the way, Cambridge, Massachusetts, is abandoning its proportional representations system—it is one of the few in the country—because it is so chaotic and they can't govern the city.

Mr. WATT. Well, again, I never have said that this will solve every problem, nor have I said that States will adopt any of these multi-member districts. All I have said is that I don't think we ought to make that choice at the Federal level, and the State legislatures have as much sense about this as we do and probably a lot closer first-hand experience.

I assume under the theory that you have just expressed Cambridge, Massachusetts, has, using its up-close, first-hand personal experience, has decided not to do this. This bill wouldn't obligate them to do this or not to do it. All it would do is authorize the discussion to be had at the State level.

I am not going to get—this really I think to the extent that you make this about me and Eva Clayton or about even minority representation, I think you are finding shadows behind the trees that don't exist. I respect your opinion on that. I just don't happen to agree with you.

Ms. THERNSTROM. Mr. Watt, with all due respect, State legislatures will not have a free hand once the Justice Department gets into the act calling multi-member districts in particular settings the only racially fair method of election.

Mr. WATT. If that would be the result of this—

Ms. HODGKISS. May I address that? Because my testimony was explicit that we would examine whatever States enact, but this does not purport to give us an ability to require States to use multi-member districts.

Ms. THERNSTROM. But in particular instances you would.

Mr. WATT. Mr. Everett?

Mr. EVERETT. In response to that I have got to admit I have gotten very cynical after 6 or 7 years finding out through depositions and otherwise what took place between the Justice Department and people here in Washington and the folks down in North Carolina that started with one plan and gradually massaged it to meet the demands of the Department of Justice. And, frankly, I came up here feeling much less committed to the idea of opposing this amendment. I thought there were dangers, but after hearing Ms. Hodgkiss and hearing what is going to happen in terms of DOJ's review, I am really scared to death, and I am afraid this will open up the Pandora's box I referred to but even open it up more widely by having the contradiction in the Federal system and having the Department of Justice indirectly control what is done so that the preferential voting will be in a way mandated on the basis of assumptions here.

So I, frankly, must say I am more disturbed now than I was originally, to be honest with you.

Mr. WATT. In all honesty, I mean, if there are disturbances, a hearing of this kind is designed to bring those disturbances out by allowing people of goodwill and people of differing opinions to express their opinions about the bill.

Mr. CANADY. Without objection, the gentleman will have 2 additional minutes.

Mr. WATT. Let me ask you, Mr. Everett, first of all, I want to thank you for coming despite your original trepidations about being here. You and I have known each other throughout the course of this litigation, and I don't think we have ever said a cross word to each other, and I still respect you.

Mr. EVERETT. It is mutual.

Mr. WATT. This is not personal, and I never have thought it was personally directed at me, even though you have been my nemesis. I haven't taken it personally.

On the issue that you raised about the Commission and favoring a Commission of people who would not take any of these factors into account, why would it not be a reasonable proposition for that Commission, if a State elected to use a Commission, to have this option as an option that it would put on the table and at least think about?

Mr. EVERETT. Frankly, I would feel much more comfortable if that were the case. I have been very impressed by legislation that has been proposed from time to time. For example, in North Carolina, there was a commission to review the electoral process, and they recommended a redistricting commission. Senator Hamilton Horton has a bill pending now which has received recommendations. The League of Women Voters has favored it and Common Cause. So my feeling is if you can get a redistricting commission, a group that is impartial, that has standards that are fairly well prescribed, then I wouldn't have the same concern about the multi-

member districts, assuming that the Department of Justice would give a certain amount of tolerance to that redistricting commission.

Mr. WATT. I appreciate it, Mr. Chairman.

Mr. CAMPBELL. I have been summoned. May I say a word, and I have to go.

Mr. CANADY. Without objection, the gentleman will have an additional minute.

Mr. CAMPBELL. I apologize that you yield to me. It is that I have been summoned, and I must leave.

Mr. WATT. My question is, what is the word you want to say? You can answer that question.

Mr. CAMPBELL. In response to your question, Mr. Watt, I have a couple of quick thoughts.

I have the highest regard for Ms. Thernstrom, particularly. We worked together in support of 209 in California. But I do wish to identify an illusion. She spoke of proportional voting and then allotted into cumulative voting. They are very different.

The problems in Israel are related to proportional voting. I personally oppose that. I think proportional voting gives far too much power to parties.

My support for this legislation is very closely linked to the cumulative voting concept. So whether you think it is acceptable or not should not be based upon a judgment that proportional voting is the same as cumulative voting. They are very different.

Secondly, it seems to me a little bit dangerous to say because the Department of Justice might pervert the process we should not give the States greater freedom. I spent a lifetime in politics criticizing those who do not give power to States, and if the Department of Justice doesn't trust the States enough, they should be criticized, but it seems odd to say, therefore, that we should not give power to States if we believe that the States have a closer representative power for the people.

Lastly, I do grant that there are dangers, and I am going to conclude with this example, but it is a pretty good one I think. I come from the Bay area in San Francisco. Nine Members of Congress gather around the Bay area. If we went to multi-member districts at-large but not cumulative voting, there would be nine Democrats. But if you went to proportional—if you went to cumulative voting with multi-member nine, everybody in the Bay area voting together, there would be three Republicans. As of today, there is 8-1.

So the concept is inextricably linked with what you do with the multi-member district. And saying that you are against it because it can lead to mischief also is to say you are against the potential of doing good, which to me is giving a greater power of the people to represent themselves as they choose to define themselves.

And with that I must leave, but I sure appreciate your inviting me. Thank you.

Mr. WATT. Thank you.

Mr. CANADY. The gentleman from Arkansas is now recognized.

Mr. HUTCHINSON. Thank you, and I appreciate this hearing.

I do reflect a little bit on my background and limited experience in Arkansas, and we had multi-member districts at the State level for members of our general assembly. And the Supreme Court

looked upon those with great disfavor, and the minority groups opposed the multi-member districts as I did because it prevented their representation. And so I am just struggling with this.

But I want to address my questions to Mrs. Hodgkiss. If this was adopted, then a State would have a choice of a multi-member district or single-member district. If they went to a multi-member district, then there would be a couple of options the States could have for voting in that multi-member district. One of them would be at-large voting where a candidate would pick a slot and that multi-member district would run districtwide and that would prevent any minority representation; is that correct? That would be a problem, wouldn't it?

Ms. HODGKISS. Assuming that there is a minority population in the district that is politically cohesive, that is correct. It would be a problem.

Mr. HUTCHINSON. And you don't like that, do you?

Ms. HODGKISS. And we would say that, under Section 2 of the Voting Rights Act, we would have the authority to do something about that.

Mr. HUTCHINSON. The only thing you could do would be to file suit under Section 2 if it is not a preclearance State.

Ms. HODGKISS. That is correct.

Mr. HUTCHINSON. Arkansas is not a preclearance State, and so that would be your option. And so the only other option would be, other than you have your at-large districts, then you would have your cumulative voting that Professor Campbell was speaking of. Is that the other option, rather than at-large districts?

Ms. HODGKISS. I believe there are a number of possibilities—cumulative voting, limited voting, a single transferable voting system. So there are actually a number—

Mr. HUTCHINSON. Would proportional voting be a part of that? Would that be an option they could consider?

Ms. HODGKISS. I don't know precisely what you mean by proportional voting. Single transferable vote is sometimes called preference voting, but I am not sure what—

Mr. HUTCHINSON. What does that mean?

Ms. HODGKISS. The voters—if you have, say, five seats to be filled and 10 candidates running, voters just rank all 10 candidates along their preferences—1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

Mr. HUTCHINSON. So if Arkansas went to multi-member districts, as the legislature has done in the past for different purposes, then you would consider that and possibly file suit against that multi-member district if they had at-large voting?

Ms. HODGKISS. If they did not—if they had a politically cohesive minority group and did not provide for one of these alternative election methods, that would give them an opportunity to elect candidates of their choice. But we would hope that they would be aware of their responsibility under the Voting Rights Act and would themselves initially use one of those alternative systems.

Mr. HUTCHINSON. Mr. Everett, you really said the ultimate solution would be good redistricting permissions. Well, ours is a State legislature. Do you have confidence in them for redistricting purposes?

Mr. EVERETT. Not really.

Mr. HUTCHINSON. I think everybody has got a self-interest in there, and it would be very difficult to accomplish. It seems very idealistic.

I guess I just want to make sure I understand. I think you have all been very helpful that, ultimately, if a State decided to go to a multi-member district, it would be the Department of Justice that would determine whether their voting scheme was sufficient or not and would violate the Voting Rights Act in any way.

Ms. HODGKISS. Not in the first instance. The State legislature, we hope, would make that analysis, but that is certainly a tool that we would have, along with private parties.

Mr. HUTCHINSON. Ms. Thernstrom, did you have a response or comment?

Ms. THERNSTROM. I do have a comment.

Ms. Hodgkiss referred to a minority population that is politically cohesive. Well, in the view of the Justice Department, the last I knew, unless they have had some kind of radical change of mind, all blacks are always politically cohesive, all Hispanics are always politically cohesive. Rural blacks never have more in common with rural whites than they do with urban blacks. Color is what defines you as an individual and—

Mr. HUTCHINSON. Let me ask, Ms. Hodgkiss, if there is any districts or States in which the Department of Justice had found there is not cohesive voting blocks within the minority community?

Ms. HODGKISS. Whenever we are analyzing a submission or evaluating a Section 2 claim, we conduct a racially polarized voting analysis using statisticians and looking at election returns. I cannot tell you off the top of my head the results of all those analyses, but we do not automatically assume that there is racially—

Mr. CANADY. Would the gentleman yield?

Could you send us a letter and let us know if there are any cases where you found where those populations weren't polarized? If you can't, that will be an answer, too. If you can, send us such a letter to give us that information. That would be helpful to the subcommittee.

The gentleman from Georgia is recognized. It is my plan to let you know that—I will let the gentleman from Georgia take his 5 minutes, and I will take so much time as I can before we go vote. Then we will go vote, but you will be released. And after the votes, which will be a series of votes, we will come back for the second panel.

The gentleman from Georgia.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Chairman, this is a very interesting exercise to go through. It is certainly interesting to read the history of the law that was passed in 1967. But, frankly, if either one or a thousand citizens in my district were asked to rank the top 1,000 issues, this would not be among them. This is, utterly, just an academic exercise in terms of the work that is important to my constituents.

What is important to them is that their right to vote be protected, and it is; and that, very frankly, at the time it comes to reapportionment that they be allowed to apportion based on the Constitution as it exists. And then if there is a problem, a demonstrable problem, then the Department of Justice can step in.

But the only complaint that I hear ever has to do with the Department of Justice. It doesn't have to do with proportional, cumulative or single-member districts. Although I was intrigued that Ms. Hodgkiss's listing of the complexities that enter into the process of apportionment didn't include the meddling of the Department of Justice, which they whipsaw the States back and forth, and that is a major problem.

But are any of you aware of any examples where State legislatures have not been able to deal with all of these complexities? I mean, they have to do it every 10 years. Yes, it is a complex exercise, but is anybody aware of any instances where they have just thrown up their hands and said, my God, this is too complex, we can't handle it, give us more options? I didn't think so. I have never heard of that.

I was intrigued, Ms. Hodgkiss, with the Department of Justice's statement that unless a proposed statute expressly provides that it is subject to the Voting Rights Act, the implication is that it isn't. It is the first time I have heard that.

Why would the Department of Justice say they would support this legislation but only if it expressly provides that it is subject to the Voting Rights Act? Doesn't the Department take the presumption that any proposed statute or an act of a statute that has to do with voting very broadly defined is subject to the Voting Rights Act and it does not need to be expressly provided? The implication of your position is that if a statute does not expressly provide, that it is subject to the Voting Rights Act. It isn't?

Ms. HODGKISS. I am not expressing a view on what some future statute may say or mean.

Mr. BARR. I am not talking about future statutes. I am saying it has been my impression that the Department of Justice's position has always been that any law that relates to voting very broadly defined, is subject to the Voting Rights Act. You are saying—the implication of your statement here is that you can support this bill only if it expressly provides that it is subject to the Voting Rights Act. The implication is that if a statute doesn't so expressly provide that, the Voting Rights Act doesn't apply. That seems to be a very tenuous position for the Department to take.

Ms. HODGKISS. I don't agree that the Department is making the implication that you are——

Mr. BARR. Why would you support it based only on the fact that it contains an expressed recognition that it is subject?

Ms. HODGKISS. It was argued based on the text of this particular statute that we support it if it expressly includes the——

Mr. BARR. Is it also your position then that the Voting Rights Act does apply to it even if it doesn't say it is expressly subject to it?

Ms. HODGKISS. It is our view that we wouldn't support——

Mr. BARR. That is not what I asked. Is it the Department of Justice's view then, if the Department of Justice believes that any law or proposed legislation that relates to voting rights is subject to the Voting Rights Act, then why wouldn't you support this even if it doesn't contain that expressed recognition?

Ms. HODGKISS. It is our view that, given the language of this particular bill, it needed to expressly say that any such multi-member

schemes would be subject to the Voting Rights Act and the one person, one vote.

Mr. BARR. In other words, is the Department saying that if this legislation did not include specific recognition that it is subject to the Voting Rights Act that the Voting Rights Act would not apply if it were enacted?

Ms. HODGKISS. No. What we're saying is that our support for this bill—

Mr. BARR. Let me ask you a more general statement to get at then. Does the Voting Rights Act apply to any legislation that relates to or affects voting rights?

Ms. HODGKISS. I don't think I can answer your question in the abstract like that. I think we would have to look at the—

Mr. BARR. This is startling that the Department of Justice—I mean, they have made all sorts of very minor statutory provisions subject to the Voting Rights Act even though there is no reference in them. They have always taken the very expansive position that the Voting Rights Act does apply to any legislation that is passed that even remotely affects voting rights. You are not prepared to say that that has been the Department's position? It leaves a very, "sort of pregnant" loop out there if you don't.

Mr. CANADY. I think—the gentleman's time has expired.

If I am going to say anything before we release them, I am going to have to recognize myself now. If you want to conclude.

On that same point, I think the point might be—when you pass the Federal statute, it might by implication supersede if not repeal provisions and by implication supersede or have an impact on some pre-existing law, and I think that would be your concern. That is why you would want to make certain that didn't happen, right?

Ms. HODGKISS. Yes.

Mr. BARR. Thank you, Mr. Chairman, for clarifying the views of the Department of Justice which they find unclarified by themselves.

Mr. CANADY. I am just trying to express what I thought the understanding was.

Let me express one element of the concern I have about this, and there are very important issues associated with this, some of which have been raised and we will talk about more with the second panel. But in your testimony, Ms. Hodgkiss, it seems to me that you at least contemplate the possibility that after the passage of this legislation, a court could require a State to use a multi-member district system with some alternative system such as cumulative voting or so on. You say it is not clear that that would be the result, but then you say it is less clear whether such measures could be ordered by a court absent a definitive indication from the State if they were using such a system.

I understand the lack of clarity, but you—that seems, from my perspective, to contemplate the possibility that a court could do that, and I find that very troubling. I think that would move us in the direction that Mr. Everett would be concerned about. And so that is just—that is something that I see there.

Mr. WATT. I suspect we could clarify that.

Mr. CANADY. That is something that could be, I think, clarified through some language. That is not the only concern I would have about it, but that is a point that I think bears particular attention.

Let me thank all of you again for being here. I think each of you have made an important contribution to the committee's consideration of this legislation, and I thank you.

And now the subcommittee will stand in recess while the members go to vote, and we will reconvene and proceed with the second panel.

[Recess.]

Mr. CANADY. The subcommittee will be in order.

We will now proceed with the testimony of our second and final panel of witnesses for this hearing today. Again, I want to apologize to those of you on the second panel for the extended interruption in the hearing, but we had a series of votes on the floor, as you know.

The first witness on this second panel is Roger Clegg, Vice President and General Counsel of the Center for Equal Opportunity, where he writes, speaks and conducts legal research on legal issues raised by the civil rights laws. From 1982 to 1993, Mr. Clegg held a number of positions at the U.S. Department of Justice. He also served as Assistant to the Solicitor General, where he argued several cases before the U.S. Supreme Court.

Following Mr. Clegg will be Theodore S. Arrington, Professor of Political Science at the University of North Carolina at Charlotte. Professor Arrington received his B.A. with honors from the University of New Mexico and his M.A. from the University of Arizona. He has written several articles and books on election law and politics and has served as an expert in numerous redistricting cases.

The third witness on this panel is Nathaniel A. Persily, Staff Attorney for Democracy Program at the Brennan Center for Justice at the New York University School of Law. Prior to joining the Center, he clerked with Judge David S. Tatel on the U.S. Court of Appeals for the D.C. Circuit. He is a graduate of Stanford Law School, where he was president of the Stanford Law Review.

The final witness on our second panel is Mark Edward Rush, Associate Professor of Politics at the Williams School of Commerce, Economics and Politics, Washington and Lee University. Professor Rush teaches courses such as American national government, constitutional law, and political data analysis, and has written extensively on voting rights and redistricting.

I want to thank all of you for being with us this afternoon and for your patience. I would ask that you do your best to summarize your testimony in 5 minutes or less. Without objection, your full written statements will be made a part of the permanent hearing record.

I will say I expect another vote around 5 o'clock. Hopefully, we will be in a position to have concluded this hearing prior to that vote.

Mr. CANADY. With that, we will proceed with the first witness, Mr. Clegg.

**STATEMENT OF ROGER CLEGG, VICE PRESIDENT AND
GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY**

Mr. CLEGG. Thank you very much, Mr. Chairman. I am delighted to be here.

It was very interesting listening to the first panel and looking over the written testimony.

As I understand it, everyone here today either believes that there is the real possibility that the proposed bill could have bad results, or they don't know what results it will have, or they believe that there is no real problem with the current system. I think that even Representative Watt, when he began by talking about the bill, was very tentative and careful to say this bill is being proposed not as some panacea but simply to get people's thoughts on whether or not this kind of approach makes sense or not.

So I would like to begin in my testimony with a few quotations. The first is from the great constitutional scholar, Alexander Bickel, who said, "Unless it is necessary to change, it is necessary not to change." The second is from the British political philosopher, Walter Bagehot, who said, "The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions that they have created."

I think that those warnings are very appropriate as this committee begins its deliberations on this bill, given its very tentative support and the uncertain nature of its consequences.

I also want to quote one other Englishman, Winston Churchill, when he was asked to speak about the desirability of democracy. In his famous response he said, of course, democracy is a terrible system, except for everything else.

I am getting the impression that the same thing can be said about single-member districts. There are certainly problems with them. But, on the other hand, at-large elections lead to disenfranchisement or to racial abuses that long generated the opposition to them in the South, and that non-at-large systems that aren't single-member districts, like cumulative voting or proportional voting or other even more radical changes, have even more substantial or potential problems attendant to them.

Besides the unforeseeable problems that some of the earlier witnesses alluded to, I think that there are, in addition, some very foreseeable ones. I served in the Civil Rights Division as a deputy for 4 years and I observed firsthand that there is not only the potential but also the reality of abuse in the enforcement of the Voting Rights Act by the voting section in the Civil Rights Division, and I think that that fact is something that this committee needs to bear in mind. The additional mischief which this bill would allow the Justice Department to engage in is considerable.

Let me make one comment about federalism here. My first reaction in reading this bill was a favorable one—to think, well, gee, this is giving more flexibility to the States, and I am a conservative, so that sounds like a good thing. Based on some of the comments that have been made here today, I was tempted during the break to call up the Federalist Society and urge them to send over someone to sign up some new members.

This is the initial reaction that people have to this bill—that, gee, it is just giving more flexibility to the States, and what could possibly be wrong with that? Isn't this consistent with federalism principles?

I actually don't think this bill is consistent with federalism principles, however, for a couple of reasons.

Number one, a basic reason for federalism is the principle of local representation. The inevitable result of this bill will be to diminish local representation.

Number two, there is a limit on the amount of deference that Congress should give to the States. In the proper composition of Congress and determining what the best way is to make up the national legislature, the national legislature has a real responsibility to step up to the plate and make its own considered judgment on what the most appropriate system is and to acknowledge that States may well abuse the flexibility that they might be given.

With that, I will rely on my submitted statement.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. Clegg follows:]

PREPARED STATEMENT OF ROGER CLEGG, VICE PRESIDENT AND GENERAL COUNSEL,
CENTER FOR EQUAL OPPORTUNITY

INTRODUCTION

Good morning, Mr. Chairman. My name is Roger Clegg, and I appreciate the opportunity to testify before this subcommittee today. I graduated from Yale Law School in 1981, clerked on the U.S. Court of Appeals for the District of Columbia Circuit, and then served at the U.S. Department of Justice from July 1982 to January 1993, including four years as a deputy in the Civil Rights Division. I am now the vice president and general counsel of the Center for Equal Opportunity, a non-partisan, Section 501(c)(3) research and educational organization, where I write and speak on civil rights issues.

H.R. 1173 is a bill "To provide that States may use redistricting systems for Congressional districts other than single-member districts." Its text is quite straightforward. Currently federal law (2 U.S.C. sec. 2c) requires that states entitled to more than one Representative in the U.S. Congress must "establish[] by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . ." H.R. 1173 would change this, so that states may choose to have their Representatives "elected from single-member districts, multi-member districts, or a combination of single-member and multi-member districts. . . ."

LEGALITY

My expertise does not extend to Article I, Section 4 of the Constitution. But I will say that, by its terms, it gives Congress the authority to pass this legislation. I will assume in my testimony that Congress has this authority.

That does not, however, mean that it would be wise for Congress to pass this bill—just that it can if it wants.

I should also note that, even when Congress has authority to pass legislation, if it abuses that authority by acting with discriminatory animus when it does so, the law might still be struck down as unconstitutional. Even in circumstances where Congress otherwise has authority to pass a law, and even if the law is not race-based on its face, if the law is passed with the idea of helping or hurting one race at the expense of another, it is still unconstitutional. Of course, acting with such a motive would be objectionable from a policy perspective even if no court struck down the legislation. Nor, finally, may Congress pass a statute permitting what the Constitution forbids.

It might be objected that these general principles should not apply here, since at worst the statute is merely giving states a power that they *might* abuse; it is not mandating such abuse. I'm not so sure about this, though. Suppose that a state re-

pealed a lynch law, knowing and hoping that there would be more lynchings. Is that action permissible because the state would not actually be doing the lynching? Or suppose that a state had passed a law like H.R. 1173 with the hope and expectation that municipalities would implement at-large systems to the disadvantage of minorities. Is that action permissible because, again, Congress has merely facilitated but not actually taken the final step?

In all events, in my view it is a very bad thing whenever Congress passes legislation to help one racial group at the expense of another. And this is especially so when the issue is voting, the right on which all others depend in our republic.

FEDERALISM

One might suppose that those sympathetic with federalism concerns would favor this legislation, since it gives states greater freedom than they currently have. There are, however, two reasons why this is not so.

First, if the result of this legislation is to increase the number of at-large representatives, the principle of more *local* representation—which is a very important reason for federalism—would actually be undercut.

And it does indeed seem likely that this legislation would create enormous pressure for the adoption of at-large representation. It certainly seems likely, in particular, that in any state where one party clearly has the upper hand, an at-large system will be adopted. Why settle for a 6-4 majority when it can be 10-0? And even if the local party were not especially inclined to pile on this way, the national party would be, and could bring pressure to bear on its state members to do so.

Second, the national legislature has a strong claim to authority and expertise in deciding how its members ought to be chosen. That, indeed, is presumably the reason that this ultimate authority is apparently given to Congress by Article I, Section 4.

There are a number of reasons why this body might wish to preserve greater local representation. Since Senators are elected at-large, that kind of representation is already present in the national legislature. The more local representation that single-member districts provide in the House should not be lost. In this regard, it is interesting to note that James Madison, in No. 56 of *The Federalist Papers*, contemplated single-member districts in which the Representatives had a good understanding of the local issues. It is interesting that one by-product of single-member districts is a wider range of viewpoints being represented in Congress (as reflected, for instance, in the House Judiciary Committee). This makes it ironic that those supporting H.R. 1173 also support cumulative voting with the argument that it will have a similar effect.

There is already a danger that Americans will come to ignore geographic community in favor of other common interests. But in some respects geographical building blocks form a more solid foundation than ideological coalitions. In all events, we should be reluctant to give up an important, remaining geographical tie for what will inevitably be a more transitory and ideological or racial set of alliances.

Finally, with multi-member districts, it will be much more difficult for constituents to hold a particular Representative accountable.

RACE

Where a jurisdiction is racially polarized, at-large systems can be used to ensure that racial minorities are kept from electing any representatives. This is hardly a novel observation. Indeed, much of the history of the Voting Rights Act's enforcement has been about its use to ensure that at-large systems at the local level not be used to this end. It is, therefore, rather ironic that it is now being proposed by Representative Watt and others that at-large elections be considered for the election of Representatives to the House.

Of course, racial gerrymandering can take place with single-member districts, too. But the recent decisions of the Supreme Court, starting with *Shaw v. Reno*, have circumscribed this danger by, for instance, making it hard to justify such gerrymandering when it results in badly misshapen districts. But it is easy to think of situations where, while it might be impossible to draw a compact single-member district that favors a particular race, it is possible to draw a compact two-member district that would do so.

The basic point is that, by adding a whole variety of additional ways to draw districts that favor one race or the other, the chances that this sort of abuse will occur are greatly increased. It also increases the likelihood of litigation, if for no other reason than there will be a whole new range of approaches on which litigants might insist.

Moreover, the Voting Rights Section of the U.S. Justice Department's Civil Rights Division will surely seize upon the opportunity for abuse that H.R. 1173 will give it. Up until now, the Section has been limited in the ways it can insist that district lines be drawn to ensure safe seats for minority candidates. Now, however, they will have many more opportunities for this mischief.

Further, if the federal government has a law that blesses the use of any combination of single-member and multi-member districts, the Section will be better able to insist that all state and local districts have this flexibility, too.

The kind of discrimination to which H.R. 1173 will open the door can hurt racial minorities in some situations and nonminorities in others. Besides, when voting systems are corrupted by racial considerations, everyone loses.

Racial gerrymandering discourages interracial coalition-building. It marginalizes the importance of black voters. Frequently the concentration of minority voters may reduce electoral competition and indirectly discourage political participation. It encourages identity politics and discourages voters from thinking for themselves.

Finally, cumulative voting is unlikely to be adopted if single-member districts are used. For multi-member districts, however, this system becomes a real possibility. Lani Guinier has advocated this system as better suited to achieve social justice than nondiscriminatorily-drawn single-member districts. But cumulative voting—even more so than outright gerrymandering—discourages coalition building and facilitates identity politics and, especially, racial politicking. H.R. 1173 is written in such a way as clearly to allow the use of cumulative voting.

CONSERVATION

Over two hundred years ago, the great British statesmen Edmund Burke warned against radical changes in governance, arguing that there should be a strong presumption in favor of existing systems that have worked well. One of the favorite sayings of the late, great constitutional scholar Alexander Bickel was: "Unless it is necessary to change, it is necessary not to change." And Walter Bagehot wrote, "The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions that they have created."

I would urge the Subcommittee to ask whether the system is broken before trying to fix it.

Mr. CANADY. Mr. Arrington.

STATEMENT OF THEODORE S. ARRINGTON, PROFESSOR OF POLITICAL SCIENCE, THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

Mr. ARRINGTON. Thank you, Mr. Chairman, members. Thank you for giving me the invitation to speak here today.

My concern as I have studied political science and as I have worked on voting rights cases for 15 years now has always been consistently to improve the extent to which representative government is effective and efficient. In that regard, I certainly worked for the Voting Rights Section of the Justice Department, which has come in for some attention today, but I have also worked for a number of other plaintiffs and defendants over the years. I even worked for Judge Robinson Everett in one case and for the Republican Party in Georgia, North and South Carolina.

What I think we have to recognize here, first of all, in terms of the situation, is that the question of how the districts should be drawn for Congress is a shared responsibility. The Constitution does give this Congress the authority to set some rules, and you have done that, because you have, in 1967, if I remember the date right, said that they all had to be single-member districts. So you clearly have the authority to set some rules.

But it is also up to the State legislature to actually carry those rules out and to draw the districts or set the boundaries. So it is a shared responsibility.

The question you have to answer here is, how much responsibility do you take and how much do you leave for the States? I think what you have to recognize, as you are looking at the question of how should we draw districts, what kind of districts should we have for Congress, you should ask the question, how have things changed since the writings of some of those people that my colleague here quoted?

I think if you look at the way our society is developing, what you will see is that the communities of interest in our country are coming less and less to be defined geographically. If you will listen to some of the testimony that you have heard today, you would begin to think that communities of interest are formed on the basis of how you draw the districts. But I think once you put it in that term, you recognize that is ridiculous. People don't decide what their interests are on the basis of which district they live in.

What we have seen happen is that communities of interest, people who are interested in the same things, who see each other as part of the same group, are more and more in our society becoming dispersed geographically, so it is difficult to draw districts in such a way as to fairly represent all the different interests that should come into play in this body.

Now, in many cases it is perfectly appropriate and possible to draw single-member districts to represent all of the major interests that need to be represented. Maybe that is the usual situation. But I would argue that there are many situations in which there are groups, and I am going to call them minorities for right now, who are dispersed in such a way that they cannot be represented in a single-member district system, or they can be represented only if you draw districts that are so bizarrely shaped that the Supreme Court won't like them.

When I say minorities here, I do not necessarily mean the minorities who are protected by the Voting Rights Act. Minorities in the sense that I mean it could be ideological, religious, ethnic. It could be lifestyle, urban, rural. It could be any kind of minorities that may not be able to be represented in a single-member district system.

I would argue that what we need to do is to give the States authority in some cases to use multi-member districts and some form of semi-proportional voting to give representation to minorities who are too dispersed to be represented in single-member districts.

Let me draw your attention to two semi-proportional systems which I have in mind. Much of the criticism that we have heard today has been aimed basically at proportional representation systems, but, as Representative Campbell said, that is not what we are talking about in the main, and I doubt any State is going to use that system. If you are really concerned about that, you could amend this bill to provide the kinds of systems that States could use in multi-member situations.

Particularly, I am interested in limited voting and equal allocation cumulative voting. Equal allocation cumulative voting is basically what the Illinois legislature used for many years, and that is one of the reasons that Representative Porter, as I understand it, has signed onto this. Limited voting simply means if you were, say, electing three members, you might give each voter only two votes,

and that, too, would provide for minority representation. Again, whatever the minority might be.

I would take exception with my colleague's view here. I think that in trying to decide where the balance is between the rules for redistricting that you set and the rules that the State legislatures follow, you ought to give the State legislatures a little more authority.

Then just one last point. If you look carefully at some of the statements that are in writing here today, you will hear people say both this is probably not going to be used very often, but, on the other hand, it will bring the Republic to its knees. I would suggest to you that both cannot be right, and probably what you are doing here is giving some States the authority to experiment with these methods. If they are not successful, if people do not like them, I guarantee you they will disappear. If they are successful and people like them and they have good effects, then other States will copy them. That is the laboratory that our Federal system is, and I would implore you to let it work.

Mr. CANADY. Thank you, Mr. Arrington.

[The prepared statement of Mr. Arrington follows:]

PREPARED STATEMENT OF THEODORE S. ARRINGTON, PROFESSOR OF POLITICAL SCIENCE, THE UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

I am Professor of Political Science and Chairman of the Department of Political Science at The University of North Carolina at Charlotte. For twenty-six years I have taught classes in methodology, voting behavior, American political institutions, and Southern politics. For forty years I have been active in politics.

I have published numerous articles and monographs on voting behavior, especially racial and partisan voting patterns and the effects of districting and various alternative methods of voting. I have been an expert witness in over twenty-five cases involving either the Voting Rights Act or gerrymandering. In these cases I have been retained by units of government—cities, counties, school boards—voting rights groups, the Republican Party, the Federal Courts, and the United States Department of Justice Voting Section. I have been asked to analyze voting patterns or districting schemes in some of these cases, testified or been deposed in some of them, and drawn districts in many others. I have been retained in cases in Alabama, Mississippi, Louisiana, Florida, Georgia, South Carolina, North Carolina, Maryland, New York, and Prince Edward Island, Canada.

Since 1960 I have been active in elections and political party affairs, and for twelve years I was a member of the Charlotte/Mecklenburg Board of Elections, six years as the chairman of that body. Thus I have a great deal of practical experience in politics and elections. I was once active in politics in Albuquerque, New Mexico and Tucson, Arizona.

Many of the points I will make in my testimony are summarized and expanded in an article which I recently published with political geographer, Dr. Gerald Ingalls: "The Limited Vote Alternative to Affirmative Districting," *Political Geography*, Volume 17, Number 6, pp. 701-728.

My concern as a political scientist, expert witness, and political activist has always been to further the process of representative government. I ask: what can we do which will make the system more effective and accurate in translating votes into seats on governmental bodies? I certainly want the majority to rule, but I believe that minorities are entitled to a seat at the table, a voice in the legislature. When I say "minorities" here I am not necessarily referring to racial or language minorities which are protected by the Voting Rights Act. The minority that needs representation in any particular state or region on any particular governing body may be a partisan, religious, ideological, ethnic, or some other kind of minority. I believe in a full and fair representation for everybody. And when I speak of "representation" I mean simply that voters have somebody they would choose speaking for them in government bodies.

PROBLEMS WITH SINGLE-MEMBER DISTRICTS

One might ask, "Where's the beef?" The single-member district system has served our country well for over two hundred years. In many cases it continues to provide full and fair representation for the U.S. House of Representatives, state legislatures, and many local units of government. I would be the first to argue against wholesale changes in our methods of election, but the demands of the current era may be different from the demands of the past. Specifically I believe that two changes have made single-member districts less effective in providing full representation.

First, there seems to be increasing diversity of race and ethnicity, life style, living conditions, religion, ideology, language, and values in America. This change may be a product of immigration or perhaps increasing diversity in the media. Second, these diverse groups are often not concentrated geographically. Where once people could be said to identify their interests by where they lived, this is increasingly uncommon. Especially in our urban areas, people with very different values and concerns may be living near each other. Although people may group themselves into neighborhoods based on shared concerns and values, only in the very largest cities can such neighborhoods become most of a congressional district. In most urban areas many neighborhoods must be combined to form a district. Thus the concerns of minorities may be sublimated or submerged.

Single-member districts work well to represent minorities when they are large enough and geographically concentrated enough to win at least one district. But minorities that are geographically dispersed may not be able to win any district in a state and may therefore never be able to elect a candidate of their choice even when they are numerous and cohesive in their voting.

Recent changes in court rulings on the Voting Rights Act illustrate this point. In the original *Gingles* case (a North Carolina case in which I participated in a small way), which defined the application of the Voting Rights Act, the court gave three "prongs" which must be proven to show that an at-large election system is in violation of the Voting Rights Act. One of these was that the protected minority must be large enough and geographically concentrated enough to form a majority in a single-member district. "Geographically concentrated" was not defined. Initially this was taken to mean that any geographically contiguous area could be a district. Since then, however, the *Shaw* case (also litigation from North Carolina), and its progeny have further refined what "geographically concentrated" means. In doing so, the courts have declared a number of Congressional districts which were designed to provide representation for racial minorities to be unconstitutional.

The practical effect of *Shaw* is to make it impossible in many states to provide representation for racial minorities through the drawing of single-member districts. In New York City or Atlanta there are enough African-Americans concentrated in one area to form one or more Congressional districts in which they could choose their representative. In North Carolina, to take a contrary example, this is not the case except perhaps in the northeastern portion of the state. In the Piedmont area of North Carolina there are more than enough blacks to form a majority in a congressional district, but they are dispersed across several geographically distinct urban areas.

I wish to emphasize here that I am only using the example of racial minorities because the Committee members will be familiar with the developments in this area. What is true of racial and language minorities is also true of other kinds of minorities as well.

A second problem is that the single-member district system forces us to choose between representation and competition. Whenever someone complains about the lack of competition in Congressional elections, I remind them that we are electing a House of *Representatives* not a House of *Competitors*. Nevertheless, competition for office is an important value, and the lack of competition for Congressional office should be a concern for all of us. If one draws a set of districts in such a fashion as to form districts that are relatively homogeneous, one will provide for a good deal of representation. The representative will be able to know the interests of his or her constituents to a high degree, and to vote in accord with their desires. But such districts will naturally be noncompetitive especially in a partisan sense. Competition within the primary rarely if ever provides a substitute for vigorous two-party contests. On the other hand, if one draws districts to maximize competition, there will necessarily be a very large minority in each district which feels alienated from the system having voted for candidates who consistently lose. Each district would be diverse and it will be impossible for one representative to satisfy more than a large fraction of his or her constituents in voting on controversial issues. The Congressman might, however, serve almost all of them in terms of constituency service, providing information, etc.

A third problem with the single-member district system is that the drawing of districts has such a drastic impact on the process of translating votes into seats that the practice of gerrymandering has become more of a threat. It has become accurate to say that it is the legislators who choose the voters rather than the voters who choose the legislators. Of course, state legislatures draw Congressional districts, but the point is still valid as congressmen have friends and allies in the state legislature and exert much influence there. The art of gerrymandering has been greatly aided by the rapid development of geographic information systems which allow anybody to draw many alternative districting schemes in a short period of time. I define gerrymandering in the traditional way as being an effort to draw the districts in such a fashion as to misrepresent. That is, to distort the process of translating votes into seats so that some group will receive more seats than their votes would entitle them to while some other group would receive less. Gerrymandered districts might not be oddly shaped.

A related problem with single-member districts is that one may be forced to decide which kind of minority one wants to represent. Drawing the districts one way may provide fair representation for urban and rural interests, but provide an unfair partisan balance. Drawing the districts another way makes the partisan divide fair, but might result in having all districts dominated by urban interests. Drawing a set of districts which represent a diversity of cross-cutting interests may be impossible. In other words, the district drawer has to decide what kinds of interests deserve representation and which ones do not. Again, the politicians choose the voters instead of the voters choosing the politicians.

Some individuals argue that one should draw districts without regard to any interests—use natural boundaries and be as compact as possible. But as Justice White once observed, this can result in districts which are egregious gerrymanders or obviously unfair. He called it a “politically mindless approach.” Geography is not destiny . . . at least not any longer in our urban and suburban nation.

MULTI-MEMBER DISTRICTS

Although there are no multi-member congressional districts, various forms of proportional or semi-proportional election systems are in use in local governments throughout America. Such systems are also in wide—indeed, almost universal—use throughout the world. From the examples of these systems in the U.S., I conclude that semi-proportional systems can provide a remedy for some of the problems noted above.

First, semi-proportional systems provide a method of representing minorities that are numerous enough to elect a representative but too dispersed geographically to form a majority in a single-member district. This is a remedy for the “Shaw problem.” But it is applicable to much more than providing representation for racial or language minorities. There are many examples of partisan or other minorities in regions of some states that lack representation. In general, we would expect that multi-member districts with semi-proportional systems should provide a more accurate and efficient method of translating votes into seats. Diversity in representation could be enhanced by multi-member districts and semi-proportional voting systems.

Second, multi-member districts with semi-proportional voting systems allow us to combine *both* representation and competition. It is possible for a far larger majority of the voters to feel that they supported someone who represents them. Yet competition is also increased. Contrary to the myths that many Americans—including some Supreme Court Justices—have about semi-proportional systems, they are not characterized by “immobilization.” Rather, such systems are more likely to have vigorous competition than single-member districts.

Third, multi-member districts are less subject to gerrymandering than single-member districts, although the problem does not go away completely. Semi-proportional voting systems are “open” in the sense that the voters decide how to group themselves politically in terms of the candidates they support. Voters may decide that they are Republicans, or farmers, or Presbyterians when they vote and combine their votes with others of a like mind.

SEMI-PROPORTIONAL ELECTION SYSTEMS

I am sure that the Committee members have an intuitive grasp of what a multi-member district would be like, but may not have an idea of semi-proportional election systems. Proportional methods of election, such as the “single transferrable vote” system have their advocates, and I hope some of them testify today. But I think the American system of government would be better served with two semi-proportional systems that I have studied. I favor these systems for two reasons. First, because they do not require the voter to do anything unusual, allowing a bal-

lot layout which is simple, straight-forward, and familiar to the voter. And, second, existing voting equipment can be programmed to count the votes with these methods easily and cheaply.

The first of these methods is called "limited voting." Suppose a state were divided up into triple-member districts. North Carolina, for example, could easily be divided into four three-member districts. Suppose further that each voter could only vote for two people. This would provide minority representation in each district. This method of election is used by a wide variety of local governments, concentrated in North Carolina and Alabama.

The second method is called "equal allocation cumulative voting." Suppose again that the state is divided into triple-member districts. Each voter has three votes. But if the voter should vote for only two people, each would receive 1.5 votes. If the voter found only one candidate worthy of his or her vote, that candidate would receive three votes. This method was used in Illinois for the lower house of the state legislature until relatively recently, and is used in one form or another in various local elections in the south, especially in Texas. I prefer "equal allocation" cumulative voting to systems which require the voter to allocate the votes two for this one and one for that one. Few voters evidently take advantage of this flexibility, and it greatly complicates the layout of the ballot. I prefer systems which allow voters to do exactly what they already are accustomed to doing: vote for a candidate or don't.

Evidence from systematic scientific studies of these voting systems in use in the U.S. show that voters understand how these systems work. These systems provide meaningful minority representation, while still allowing majorities to form and be elected. Competition is increased as well.

In some countries proportional representation systems produce too much diversity in the legislature with very small minorities controlling policy. This is a problem in Israel, for example. But if the multi-member congressional districts are held to three or four or even five member districts, this problem is avoided. To win a seat in a three member district a minority must be of substantial size and vote cohesively. Very small minorities will not be systematically represented.

Nor am I concerned that multi-member districts and semi-proportional systems will harm our two-party system. The reasons why we have a two-party system and other countries have many parties are not completely understood. In any case, the single-member district system has not produced a two party system in Canada or Great Britain, and is probably not the major factor in producing our unique party system. My own view is that the election of presidential electors by plurality vote within each state is the glue which holds our two-party system together along with tradition and various provisions of state law.

STATES RIGHTS

I am well aware of some of the reasons for the Congressional mandate that states use single-member districts. In the early 1960s I was living in New Mexico. At that time the state had two democratic congressmen, both elected at-large. It was common knowledge that this was a form of a gerrymander. It was thought that if the state were districted into two, the district with Albuquerque would elect a Republican. Indeed, when the state acquired a third congressional seat and was districted, the Republicans won two of the three seats, and have held at least two since.

However, such abuses can be prevented without restricting the states from experimenting with multi-member districts *with proportional or semi-proportional voting methods*. I recommend that state legislatures be required to use proportional or semi-proportional voting systems if they choose to use multi-member districts.

I would oppose requiring states to use multi-member districts or any particular form of voting. Our states are the great laboratories for reform. This is one of the most important features of our federal structure. The Congress should free the state legislatures to experiment with these proportional or semi-proportional systems. If the experiment proves successful, other states will follow. If the experiment is not successful it will be abandoned. I recommend that we allow states the right to use a variety of methods to choose Congressmen. No more than this is needed, no more is wise at this time.

Mr. CANADY. Mr. Persily.

**STATEMENT OF NATHANIEL A. PERSILY, STAFF ATTORNEY,
BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY
SCHOOL OF LAW**

Mr. PERSILY. Thank you for inviting me to speak on this bill. It is one of the more significant election-related pieces of legislation this body has considered in the last 25 years. But I think my written statement deals with a lot of issues. It is relatively lengthy, and I will refer you to it. It deals with issues such as voting turnout, costs and other issues.

Let me try and respond to some of the issues raised before the break, because you got the feeling there was this brooding omnipresence of The Manhattan Institute that left the room with certain arguments unanswered.

First of all, just as all of you noted beforehand, there is the possibility of changing the bill in order to accommodate the concerns that Professor Thernstrom mentioned. Second, remember that States are allowed to challenge DOJ decisions in D.C. District Court according to Section 5 of the Voting Rights Act.

Perhaps more importantly, and this deals with the new constraints that the Supreme Court has put on States, if a State decides a multi-member district is the way they are going to race-consciously district or States use multi-member districts as a solution where race is the predominant factor, those schemes would be unconstitutional as well.

So the sort of idea of the Federal Government forcing States to adopt racially gerrymandered multi-member districts is not a realistic one. What is realistic is that the States are in a bind right now, and this is the problem that perhaps Congressman Barr was looking for but did not find.

There are new constraints which the Supreme Court has put on States in the last 10 years, since the last census, and those constraints are what this bill is designed to affect. Realize that in addition to the one person, one vote requirements and, of course, the possible scrutiny for vote dilution under Section 2 of the Voting Rights Acts and pre-clearance under Section 5, now States have to figure out what the Supreme Court means when it says that a districting system cannot use race as the predominant factor. No one knows what that means. What this bill gives them is a way out.

Right now, they are caught between the rock of the Voting Rights Act requirements and the hard place of the Supreme Court's decisions in *Shaw v. Reno* and its progeny; and multi-member districts, as Congressman Campbell and some others have mentioned, allows them an opportunity to craft districts which are not strangely shaped, which take several communities into account, and which represent them using different voting rules.

Moreover, one of the phrases that one often hears in these court decisions is traditional districting principles, or traditional ways of representing communities.

In fact, traditional communities can't be represented under the current system. If you think about the way most of us conceive of our political identities, it is not that we live in Georgia's 11th district or New York's 15th district. It is that we think of ourselves living in a certain city or county or State. But we can't draw con-

gressional districts around those organic, historically rooted districts or those historically rooted identities.

Because of the equipopulosity requirement of *Baker v. Carr* and its progeny, we have to split up these communities into equal districts. This bill would allow States to actually represent what are the natural communities of interest. These are districting principles that the Supreme Court has said the States in *Shaw v. Reno* and the other cases have violated.

But let me deal also with this persistent fear on the horizon that we might be turning the United States into Israel.

First of all, regarding the case studies that have been noted, remember that David Duke did win in a single-member district in a State legislative election in Louisiana. There is nothing inherent about a single-member district which prevents the rise of extremist candidates.

But there are many ways to moderate the effects, whether it be multipartism or factionalism, with different rules that could moderate the effects of proportional representation and alternative districting systems.

I commend to you the work of Arend Lijphart, who is a professor at the University of California-San Diego. He goes into exhaustive detail, which we don't have time to here, about all the possible electoral systems that are used around the world, some which definitely result in the factionalism and problems and others which moderate those effects.

Let me also emphasize some of the other points that were made before. I still believe that this fundamentally is a question of federalism, who is going to decide how States should represent themselves in the national legislature. It was an intentional decision of the Framers not to include that in the Constitution, and for the first 50 years multi-member districts were used by small States in particular to elect representatives. True, those were used at-large, and, as we heard before with Congressman Campbell, it is an issue of concern, that this bill, in its current form, doesn't prevent the submergence of minorities, whether they be racial or political, under a large multi-member, at-large district. But as the gentleman before me explained, if we are truly considering States to be laboratories of democracy, it is proper we should start with experimentation in this area.

Thank you.

Mr. CANADY. Thank you.

[The prepared statement of Mr. Persily follows:]

PREPARED STATEMENT OF NATHANIEL A. PERSILY, STAFF ATTORNEY, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. Chairman and members of the Committee:

Good afternoon. My name is Nate Persily. I am a staff attorney specializing in issues of representation and redistricting at the Brennan Center for Justice at New York University School of Law. The mission of the Brennan Center is to develop and implement an innovative and nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Issues of redistricting and representation, because they are so intertwined with the right to vote, are of particular concern in fulfilling that mission.

I am honored that you have invited me to testify before this Committee concerning what might be the most important piece of election-related legislation considered by this body in 25 years. The importance of the bill, however, is matched only by

its brevity and simplicity. After all, the States' Choice of Voting Systems Act would merely give back to the states a power they were given at the time the Constitution was passed—namely, the power to craft congressional electoral systems with multi-member districts that are tailored to the unique political cultures of each state. The practice was widespread among the smaller states for the first fifty years of our nation's history and has frequently reappeared in state, local, and federal elections. Like other "pro-federalism" bills this body considers, the central issue the States' Choice of Voting Systems Act presents is whether, in the field of redistricting, Congress or state governments know best. While I will deal here with many of the familiar legal and policy arguments waged against districting systems other than those currently used to elect our representatives, this should not obscure the focus of this bill, which is a classic question of states' rights.

Let me begin, however, by saying what this legislation is not. H.R. 1173 is not a sweeping reform of the traditional, geographically-based system of representation for House elections, it does not mandate or even imply that states should adopt a European-style system of proportional representation, and it does not alter the protections codified in the Voting Rights Act of 1965. Given the lack of familiarity most Americans have with alternative electoral systems, there is a great risk that observers might misinterpret or exaggerate the effects of this legislation.

The number of representatives elected from a district—the only variation in the American system of representation that this legislation will introduce—is only one small component of an electoral system. And it is difficult to consider the effects of this one variation (assuming states even elect to exercise the newly given power) in isolation. The impact of this change will depend more on other innovations and decisions states make for structuring the electoral system, particularly the decisions whether to adopt proportional, cumulative, or at-large voting rules and how large the multi-member districts will be. Other decisions include whether ballots will include candidate names or merely party labels, whether and how voters might rank their preferences for candidates, and how the state might change the party primary system to adapt to the multi-member districting system. Each of these decisions can have the effect of counteracting or magnifying any given political consequence proponents seek or opponents fear. No one can say with confidence how this bill will affect the electoral system of any state—indeed, the same set of rules could produce different political consequences for different regions of the country—and no one can predict with any accuracy how this will alter the national system of representation in the House of Representatives.

With this caveat in mind, let me nevertheless offer some thoughts on the possible consequences of a state's exercise of the power that this bill would cede. I will confine my discussion to the legal, partisan, and electoral consequences of the proposed bill, in general, and leave to others the more technical task of explaining the multiplicity of electoral systems from which each state could choose. On this latter point, though, I commend to you the work of Professor Arend Lijphart, a political scientist at the University of California at San Diego, who has written more than anyone has on the topic of comparative democracy and alternative electoral systems.

LEGAL ISSUES PRESENTED BY H.R. 1173

Vote Dilution Claims

The States' Choice of Voting Systems Act comes before you at an auspicious time. In the wake of a series of court decisions restricting state discretion in the redistricting process, this bill could revive some measure of autonomy at this critical stage right before the census is taken and the wrangling over redistricting begins. While it will restore state autonomy over redistricting, the bill may also help states deal with the intractable problems of racially polarized voting and the persistent obstacles to participation and representation of racial minorities in the electoral process. Single-member districts, because they force constituencies to be defined by small, contiguous geographic units, have the inevitable effect of skewing the process of representation away from political, racial, or economic interests that are not neatly tied to a piece of land.

Although both Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment protect against districting regimes that discriminate against people on the basis of race, the sharper teeth of the Voting Rights Act have made it the primary tool for challenging systems that have the effect of diluting the votes of racial minorities. By its language, Section 2, as amended in 1982, protects against any "prerequisite to voting . . . which results in a denial or abridgment of the right [to] vote on account of race or color," but specifically does not establish a right of proportional representation to protected class members. At-large multi-member districts, wherein several candidates are elected by a majority of a constitu-

ency and which under this bill would become possible for House elections, have proven to be the likely targets for lawyers litigating after the 1982 Amendments to the Voting Rights Act. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court established that such districts could be broken up into single-member districts if the racial minority challenging them was cohesive and sufficiently large to constitute a single-member district majority, and voting behavior in the multi-member district was racially polarized. The same standard would apply to new multi-member congressional districts as subsection 2 of section 2 of the proposed bill specifies.

But this legislation also makes possible additional scenarios of racial vote dilution—exactly the harm the 1982 Amendments to the Voting Rights Act were intended to prevent. A racial minority in a single-member district that is then subsumed into a larger multi-member at-large district cannot make a vote dilution claim under current interpretations of section 2 of the Voting Rights Act no matter how racially polarized the district's voting behavior. For example, a district with a 40% African-American minority (i.e., not large enough to be a majority) that is then combined with a district with no African Americans will diminish the African-American vote to 20% if the combined district operates under at-large rules. There are easy solutions to this apparent problem of diminishing influence—such as operating under cumulative voting or proportional electoral rules, but I think this perverse consequence should be flagged nonetheless. The Committee should perhaps consider additional language to guarantee that multi-member districts cannot use at-large voting rules to further the nefarious purposes that required Congress to get involved in the scrutiny of dilutive districting processes in the first place.

On balance, however, the possibility of alternative electoral systems—keeping in mind that this legislation makes such alternatives only a possibility—allows for the potential exercise of increased electoral influence by political and racial minorities that currently feel their votes are wasted because they are submerged in a single-member district dominated by political adversaries. Members of a minority group currently dispersed among several single-member districts may gain strength when consolidated into a multi-member district using rules other than at-large voting. Under a cumulative voting system in a five-member district, for example, a voter would be able to cast five votes for any individual candidate or disperse them among the candidates as she sees fit. Such a system, currently employed in over fifty local jurisdictions and used in elections to the Illinois House of Representatives for over a century, is widely hailed as measuring intensity as well as volume of interest group preferences and thought responsible for increased rates of election of racial minorities.

Section 5 of the Voting Rights Act and Race-Based Districting

While this legislation may prove essential for replacing an electoral system that currently submerges minority political influence, it also provides states with a coping mechanism for the contradictory forces of the Voting Rights Act and the Supreme Court's decisions on race-based districting. Section 5 of the Voting Rights Act requires certain states, mainly in the South, to obtain preclearance from the Department of Justice for their redistricting schemes before putting them into effect. The Justice Department will not preclear "retrogressive" redistricting schemes: those that diminish minority influence by subsuming a majority-minority district into a larger multi-member district or by breaking up such a district into other single-member districts where minorities have less of a percentage of the electorate than before. At the same time, however, *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny impose the additional requirement that any redistricting scheme that uses race as "the predominant factor" violates Equal Protection. So in order to abide by both the statutory requirements of section 2 and section 5 and the constitutional requirements of the Equal Protection Clause, states must take race into account, but not too much.

The upcoming round of redistricting following the 2000 census presents to the states for the first time the challenge of being caught between the rock of the Voting Rights Act and the hard place of the *Shaw* Court's interpretation of the Equal Protection Clause. The States' Choice of Voting Systems Act gives them a potential way out. Instead of crafting serpentine districts to satisfy the various legal and political forces constraining their districting decisions, states may decide that a multi-member district could allow them to create districts that avoid giving courts the impression of race-based districting, but at the same time satisfy the strict requirements of the Voting Rights Act.

Of course, multi-member districts are not by nature immune from a challenge by the Department of Justice under section 5 or by plaintiffs suing under *Shaw v. Reno*. Multi-member districts where race is the predominant factor in their creation would fall just like their single-member district counterparts. But under various vot-

ing rules, such as cumulative or limited voting, a district might be able to satisfy *Shaw's* new constitutional criteria and keep constant a level of minority voting power to satisfy the Justice Department.

The bottom line for issues of compliance with the legal constraints on redistricting, whether they be from the Voting Rights Act or the Constitution, is this: At a time when the courts have slowly taken away more and more of the redistricting tools previously available to states, the States' Choice of Voting Systems Act restores at least one more tool to satisfy the multiplicity of political interests that sit at the redistricting table after the census is taken.

Possible Equal Protection Claims

Subsection 2 of section 2 of the bill only allows states to experiment with systems of multi-member districts that meet the "constitutional standard that each voter should have equal voting power" established by the Supreme Court's decision in *Reynolds v. Syms*, 377 U.S. 533 (1964) and its progeny. In later decisions (*Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983)), the Supreme Court further refined the one-person, one-vote test for congressional districting by requiring states to "come as nearly as practicable to population equality." That standard was extended in *Fortson v. Dorsey*, 379 U.S. 433 (1965), a case dealing with redistricting of the Georgia State Senate, which used some single-member districts and some multi-member districts elected at-large. So long as the ratio of representatives to voters remains equal, the court held, no one-person, one-vote problem existed. In other words, the court defines equal voting power irrespective of the number of representatives elected from each district. Although the Court applies an even stricter standard of mathematical equality to federal districting decisions, no problem should exist if multi-member at-large districts exist alongside single-member House districts.

However, H.R. 1173 also allows for the possibility, perhaps even the probability, of mixed systems of representation where a state employs both single-member districts and multi-member districts that use non-plurality electoral systems. (I say the probability because, of the fifty or so countries in the world that use multi-member districts for legislative elections, only the small island country of Mauritius uses a system of at-large multi-member districts.) A state may decide, for example, to use multi-member proportional districts for cities, but single-member (at-large) districts for rural areas. In that case, a plaintiff in a single-member district who feels her vote is wasted because her party is repeatedly outvoted may argue that she has a right to the same proportional representation system as her neighbors in multi-member districts. Given that regulations that distinguish among citizens in their fundamental interest to vote can only pass scrutiny if they are narrowly tailored to further compelling state interests, it is unclear how the Supreme Court would handle such a claim. Perhaps the ratio between representatives to voters is the only issue relevant to Equal Protection scrutiny in this area. But more likely, the Court will force the state to justify why it chose to favor some voters with one electoral system while it disfavored others.

EFFECTS ON THE PARTY AND ELECTORAL SYSTEM

Partisan Gerrymandering

So while this bill restores to the states a much needed tool, it is a tool, like many others, such as new redistricting technologies, that can be used for good or ill. Multi-member districts operating under at-large voting rules, for example, can be used to dilute the vote of political adversaries just as such districts dilute the power of racial minorities. Under current law, parties in charge of the redistricting process only have the ability to "crack" the support of their adversaries by splitting up opposition voting blocs among multiple districts or "pack" them all into a few districts. This bill would allow for the possibility of "stacking"—namely, the strategy a political faction uses to turn a single-member district majority into a multi-member district minority by enlarging a district to the point where one can outvote one's opponents.

The constitutional standard for establishing a partisan gerrymandering claim is very difficult to meet and has never been used to strike down a redistricting scheme for House elections. A plaintiff needs to show that the electoral system "will consistently degrade a . . . group of voters' influence on the political process as a whole," *Davis v. Bandemer*, 478 U.S. 109, 147 (1986). Thus courts will be reluctant to find that partisan stacking of the type I have just described, even if used to dilute the entire statewide opposition of a party, rises to the level of an unconstitutional partisan gerrymander.

Multipartyism and Party Strength

Some proponents of this legislation will no doubt point to empirical evidence from European democracies that employ multi-member districts with a variety of proportional representation or "PR" systems. Rather than forcing candidates to win majorities in single-member districts, those systems translate a party's share of the vote into a roughly proportionate percentage of seats in the legislature. In general, those countries have higher voter turnout, a greater number of political parties, greater ideological and racial diversity represented in the legislature, a higher number of women representatives, and closer linkages between parties and social groups, such as ethnic or religious groups or labor unions. Opponents of the bill might point to those same systems, but concentrate on their greater tendency toward coalition government, instability, factionalism, occasional instances of disproportionate power exercised by small parties, and the weak parliaments in presidential systems employing those voting rules.

Nothing inherent in multi-member districts or even proportional representation systems necessarily implies a growth in the number of parties. If combined with high electoral thresholds, smaller multi-member districts or other constraints on the electoral system, states can ensure that the multipartyism prevalent in European democracies stays overseas. In addition, the other obstacles to minor party success in America, which include a presidential and senatorial electoral system that uses statewide districts, cumbersome ballot access rules that favor the two major parties, and an electorate that by world standards is perhaps the most politically moderate, could stunt the growth of additional parties.

Thus, while political scientists have emphasized the destabilizing consequences for presidential systems with parliaments elected through proportional representation, the apocalyptic forecast is both premature and easily avoided with the tweaking of the rules of any proportional system. It seems quite unlikely that the use of proportional representation would become widespread to the point of threatening the policy-making process or regime stability. Single-member districts allow for a personal vote and constituent service that Americans have grown to love. Multi-member districts will likely be used as solutions to what are seen as redistricting "problems" rather than a fundamental transformation of the national electoral system.

Cost of Campaigns

Perhaps the most troublesome critique of this bill comes from those who worry about the increased costs a candidate would bear by running from a larger electoral district. For if a candidate adopted the strategy of seeking every vote in a large multi-member district, the argument goes, campaign costs would grow alongside the size of the district. Direct mail to more people, television commercials over a wider area, and canvassing of a greater number of neighborhoods would inflate the costs of campaigning.

While the data are incomplete on this issue, they do not seem to support such a conclusion. In analyzing North Carolina General Assembly races, which employ a mix of multi-member and single-member districts, the Center for Voting and Democracy found that candidates spent on average about 20% less in multi-member district elections than they did in single-member district elections. In studying Chilton County, Alabama's transition from single-member districts to cumulative voting, Professor Richard Pildes and Kristen Donoghue found no change in campaign costs because candidates continued "to target their campaigning to specific areas, in effect replicating a district based election." Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 UNIVERSITY OF CHICAGO LEGAL FORUM 241, 300. In addition, depending on how involved the parties are in selecting and campaigning for their slate of candidates in a multi-member district, there is the chance that campaigns would, in a sense, become more efficient as parties run ads and direct their mail in favor of slates instead of individual candidates.

Nevertheless, the threat of rising campaign costs, like the threat of factionalism and multipartyism, is cause for concern in the creation of multi-member districts. And states considering using them should craft electoral rules that moderate those effects.

Voting Turnout and Electoral Competitiveness

Many of the arguments of those who wish to reform the highly majoritarian system of U.S. House elections boil down to a philosophical conviction that votes are wasted in districts that have foreordained winners. Pointing to higher voter turnout in PR regimes, advocates urge that multi-member districts will allow for a greater probability that each voter will cast a "meaningful" ballot for at least one candidate or party that has a chance of winning seats. Minority voters—whether racial or po-

litical—would thus not be shut out by the electoral system; they will simply get their fair share.

Although fewer votes are indeed wasted under alternative electoral rules and voting turnout tends to be higher, it would be a mistake to conclude that votes are more "efficacious" in such systems. Indeed, the governing coalitions in some European democracies using PR tend to turnover less than the ruling majorities in plurality-based systems. Many voters feel that their votes are wasted under such systems, not because their votes went uncounted, but rather because the components of the governing coalition remain quite consistent over time.

Why a State Might Adopt Multi-Member Districts

While it seems quite likely that stalemated state governments may throw up their hands and adopt multi-member districts to solve partisan difficulties in districting, governors and legislators are not the only actors involved in redistricting. Courts often step in when a state is unable or unwilling to craft a plan that satisfies the many legal constraints on legislative redistricting described above. If the state fails to abide by Justice Department orders under section 5, or cannot come up with a plan that satisfies section 2 or the one-person, one-vote rule, judges may accept, quite reluctantly and after protracted litigation, the task of redistricting part of a House delegation. For courts, in particular, the option of multi-member districts may prove particularly attractive as an easy way out of the partisan quagmire presented by drawing lines for single-member districts. Instead of risking the possibility that a certain set of district lines will be seen as biased toward one party, courts may see multi-member districts as a ready-made solution for satisfying their legal obligations while avoiding a political mess.

There is a more beneficent view of why states would opt for multi-member districts, however, and it is one that fits squarely into the Supreme Court's admonitions on this topic. In many of the recent cases, the Court has repeated the mantra of "traditional districting principles" as if there is consensus on what the phrase actually means. Multi-member districts allow for the possibility that traditional political communities, such as counties or cities or even whole states, could be represented as organic units in the Congress—a practice that was part of the redistricting "tradition" before the court imposed the one-person, one-vote rule. Under present law, district boundaries rarely overlap with anything that can be defined as a political community. While most voters know what city or county they live in, very few can identify that they live, for example, in New York's 13th Congressional District. Although the one-person, one-vote rule will make it difficult to make congressional districts perfectly coterminous with these other political communities, the multi-member district option opens up the possibility that more salient regional identities will be expressed in a state's congressional delegation. Thus, instead of working against the grain of geographic districting, which is a frequently heard critique of multi-member districting schemes, such systems can reinforce regional identities for communities that have historical and political meaning for their inhabitants.

Finally, to return to the point from where I began, the States' Choice of Voting Systems Act is primarily a instrument of federalism—not any particular political ideology or conception of representation. This bill poses the central question of whether Congress impose a one-size-fits-all scheme of districting on the states or whether the states ought to retain some power to adapt their electoral system to meet their local needs. In this sense, the bill restores the intent of the Framers who opted against constraining states' decisions on how to represent themselves in the national legislature.

If multi-member districts become the system of choice in America, the impact on our national institutions could be anything from ineffectual to dramatic depending on what other institutional rules accompany them. But they would then be the system of choice, not default. At a time when the Congress has pushed power down to the states to experiment with all types of social welfare legislation, it seems particularly appropriate that states ought to be given at least some power to explore this more fundamental question of federalism. In the tradition of those who framed the Constitution, H.R. 1173 allows states to experiment with different ways their citizens can choose their leaders. In this sense, perhaps more than any legislation recently considered, this bill truly allows states to be "laboratories for democracy."

Mr. CANADY. Mr. Rush.

STATEMENT OF MARK EDWARD RUSH, ASSOCIATE PROFESSOR OF POLITICS, WILLIAMS SCHOOL OF COMMERCE, ECONOMICS AND POLITICS, WASHINGTON AND LEE UNIVERSITY

Mr. RUSH. Thank you.

I guess my approach to this is to try my best to seize the middle of the ideological spectrum with regard to electoral system reform and admit up front I am sort of skeptical about the enterprise in general. I don't think it would make a whole lot of difference one way or another.

The reason I say this is, first, I guess, as Mr. Barr suggested, most folks don't think about this, so they are going to go and vote one way or another and go back home, and I think democracy will endure.

Second, in general, all electore systems have their drawbacks or idiosyncracies or warts, their good points or their bad points, and there is always someone who would say we could tinker with this a little bit and make it better for one group or another group, whatever the case may be.

I think, at least in the American context, any move away from the single-member districts will resolve one terribly painful problem which the country goes through every 10 years, which is the redistricting experience. We end up in court and redistricting cases endure most of the decade for which they began.

By definition, some type of PR or multi-member districts would diminish the redistricting controversy, because if you have fewer districts with more people in them, you have correspondingly fewer district lines to fight about. So technically we wouldn't be fighting as much.

Instead, what I think we would probably do in the current legal context is substitute one set of problems for another. Instead of fighting over where a congressional line is drawn, we would fight over things such thresholds of exclusion, the number of representatives in a particular district, where an entire district would be, and so on and so forth. That is basically because the bottom line is all electoral systems dilute somebody's vote. At bottom, you could even make the argument that the size of a legislature is dilutive. And there was a case in *Holder v. Hall* a few years ago which basically raised this issue, concerning the size of I think a county council.

In any event, in at least the United States' context, any group whose size nationwide is less than $\frac{1}{435}$ th of the population is technically discriminated against. So you can take that same argument to any State. Its congressional delegation will limit who can get in. The size of the congressional delegation will certainly dilute any group who isn't big enough to get at least one seat in a proportional representation system.

Different issues were raised comparing us to what might happen, could we turn into Israel or not. David Duke was raised as well, and Professor Persily made the point certainly he gets elected in a single-member district system. So, again, you can have bad guys and good guys elected under any set of circumstances.

I think what is important to do is sit back and realize that PR or different forms of proportional representation and single-member districts are used worldwide, democracy does endure, and it hasn't resulted in really, I think, the downfall of any particular

country, with very few exceptions, and those are really historically isolated.

Different countries emphasize different values, and I think this is one important thing to note. If we do switch to some sort of multi-member district system or some form of proportional representation, it is important to appreciate why it seems to work so well in other countries. That is because other countries have different constitutional systems.

Most countries with PR do not worry about *Baker v. Carr*, the one person, one vote rule. In many cases the size of the single-member districts that they use, or even multi-member districts, are determined in large part by historically determined geographic subdivisions, and then they try to tinker with the number of seats allocated to that particular region or what have you. But one person, one vote isn't as big a deal generally speaking.

In many cases as well we are dealing with systems, what are known as strong party systems, with much more party control over individual candidates and so on and so forth. So the proportionality element is really focused on parties, not specific individuals.

We are constrained by the notion of vote dilution as it has been developed in the Supreme Court jurisprudence and in the wake of the Voting Rights Act as it was amended. All electoral systems dilute votes. I think one irony to what we are looking at now is the conversion to any sort of PR or multi-member system would mathematically in some ways make it difficult for small groups to get elected.

The reason I say this now is, if you can imagine, North Carolina has 12 districts. Technically speaking, a group, if it is geographically concentrated, needs to be about 4.5 percent of the North Carolina population, that is one-half of $\frac{1}{12}$ th of the population to be a district-based majority and it can elect someone. If you shift to a system using Statewide population, you essentially raise the quota, the price of the seat. You need to be $\frac{1}{12}$ th of a population. So, ironically, a conversion to some forms of proportional representation might run afoul of the concept of vote dilution in the Voting Rights Act as it is interpreted.

Does this mean I have a minute, or I am done?

Mr. CANADY. You have a little while longer.

Mr. RUSH. In general then—I will just finish—it is a skeptical reaction to the proposal. I don't think it will make a whole lot of difference, but it is important to bear in mind that with a switch to another system of voting in elections, you can't just graft that onto the existing constitutional system and expect nothing to happen. It is like you can't just change back to leaded gas in your car. It will have ripple effects throughout the entire automobile system.

The same here. What makes PR work well and attractively in other countries is because they have different political systems. We want to think about the ripple effects of just changing the electoral system.

Thank you.

Mr. CANADY. Thank you, Mr. Rush.

[The prepared statement of Mr. Rush follows:]

PREPARED STATEMENT OF MARK EDWARD RUSH, ASSOCIATE PROFESSOR OF POLITICS,
WILLIAMS SCHOOL OF COMMERCE, ECONOMICS AND POLITICS, WASHINGTON AND
LEE UNIVERSITY

INTRODUCTION

Thank you for inviting me here today. By way of introduction, I am Associate Professor of Politics at Washington and Lee University. I am also chair of the Organized Section on Representation and Electoral Systems of the American Political Science Association. I have written, co-written and edited books on electoral systems and redistricting in the United States and numerous articles on the Voting Rights Act and electoral systems.

ELECTORAL SYSTEMS, ELECTORAL REFORM AND REPRESENTATION

Depending on who you read, the American electoral system is either grossly antiquated, outmoded and unfair, or it is simply one of many possible electoral systems that all have their good and bad points. I would like to emphasize the latter point.

Many academics and reformers attack the unfairness of the Single-Member Plurality (SMP) electoral system for several reasons. First, it distorts the will of the people insofar as it does not accurately translate their partisan votes into legislative seats. As a result, SMP can "manufacture" majorities and, sometimes, result in minority rule. Second, it is quite difficult for women and minorities to elect, in the words of the Voting Rights Act, "candidates of their choice." As well, Justice Clarence Thomas noted in *Holder v. Hall*, the reliance on single-member districts (SMDs), coupled with the Voting Rights Act's requirement that we protect minority representational opportunities ensures that the decennial reapportionment and redistricting processes will continue to be plagued by controversy and cries of "gerrymander."

Critics of SMP contend that the solution to such problems is to switch to some form of proportional representation (PR). Furthermore, they assert that PR will also solve many of the other problems that ail the American electoral process: low turnout, issueless and expensive campaigns, noncompetitive elections, lack of representation for women and minorities, and so on. But, reformers frequently fail to explain how—and at what price—a conversion to PR (or, for that matter, any other electoral reform) would bring about the political improvements they desire. Thus, it is important to determine clearly, what exactly it is that we hope to accomplish by converting to alternative electoral arrangements and what the unintended consequences of such changes may be.

WHAT A CONVERSION TO PR WILL DO

Perhaps the most obvious result of a conversion to PR is that it would render the decennial redistricting process much less complicated and controversial. By definition, PR requires the use of multi-member electoral districts. With more representatives per district, there would be fewer districts to draw and correspondingly fewer district lines to fight about. In fact, the Center for Voting and Democracy (CVD) has already crafted hypothetical maps for North Carolina and Georgia which include multi-member districts (see appendix). They converted North Carolina from 12 single-member districts to 4 three-member districts; Georgia was similarly converted from 11 single-member districts to 2 three-member districts and 1 five-member district. In both cases, the alternative districting schemes would 1) simplify the districting process and 2) technically enhance minority representational opportunities without having to draw bizarrely shaped districts like the North Carolina 12th and the Georgia 11th (see the attached maps).

This makes sense in theory; however, it would not necessarily manifest itself in practice. While PR may have a lot going for it in terms of its being the preferred electoral system of many academics, it may, nonetheless, run afoul of the Voting Rights Act as it was amended in 1982. This is due to the fact that the vision of democracy underlying PR is not completely compatible with that underpinning the VRA.

PR, VOTE DILUTION AND THE VOTING RIGHTS ACT

Section 2 of H.R. 1173 reads:

In each State entitled in the One Hundred Eighth Congress or in any Congress thereafter to more than one Representative in Congress under an apportionment made pursuant to the provisions of section 22(a) of the Act of June 18, 1929 (ch. 28; 46 Stat. 26)—

(1) there may be established by law a number of districts equal to the number of Representatives to which such State is so entitled and Representatives may be elected only from single-member districts so established, or

(2) such State may establish a number of districts for election of Representatives that is less than the number of Representatives to which the State is entitled and Representatives may be elected from single-member districts, multi-member districts, or a combination of single-member and multi-member districts, if that State uses a system that meets the constitutional standard that each voter should have equal voting power and does not violate the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

Subsection 2 is vital to the successful conversion to PR. First, challenges to electoral systems rely heavily on section 2 of the amended VRA. In response to the Supreme Court's decision in *City of Mobile v. Bolden* (1980), Congress amended the Act in 1982 to allow challenges to electoral arrangements that had the effect of diluting minority votes—regardless of whether they had been drawn with the intention of doing so. By removing the intent standard, Congress removed a virtually insurmountable hurdle to gerrymandering claims. On the other hand, it also opened the floodgates for a potentially endless string of lawsuits.

The problem with the concept of vote dilution—as framed by the amended VRA—is that it threatens any electoral scheme because all electoral systems dilute someone's vote. As defined by the VRA and interpreted by the Supreme Court in *Thornburg v. Gingles*, a multi-member district electoral arrangement is discriminatory if it buries a geographically compact group of minority voters that would have been able to function as a majority in a single-member electoral district. The Gingles Court set forth the three factors necessary for a viable vote dilution claim in a multi-member district. It ruled that a plaintiff group must show:

1. that it is large and geographically dense enough to comprise a majority in a single-member district,
2. that it votes cohesively, and
3. that the white majority votes in a manner sufficiently cohesive to prevent the minority from electing its preferred candidate (Gingles, 50–51).

In *Grove v. Emison* and *Voinovich v. Quilter*, the Court confirmed that these same criteria would apply as well to single-member districts.

Thus, in simplistic terms, in a state with one million voters and 10 congressional districts, a party or group needs 50,001 voters (50%+1 of the voters in any district) to win a seat. If minority voters are sufficiently numerous and geographically compact that they could function as a 50,001-person majority in a single-member district, Gingles, Grove and Voinovich declare that the districts must be drawn in a manner that allows them to do so.

These factors do not, in and of themselves require the creation of bizarre districts. However, in addition to drawing majority-minority districts, states are required to draw legislative and congressional districts that have equal populations. Combined, these two requirements ensure that district shapes will be contorted.

This scenario results in a troubling side-effect: very low turnout in majority-minority districts. As James Campbell (1996, 208, 302 n.35) demonstrated, the SMP system, coupled with remedial redistricting results in very low minority turnout in those districts. Accordingly, the SMP system actually cheapens the price of minority congressional seats because such districts are frequently uncompetitive and therefore easy wins for the minority candidate.

This combination of factors qualifies the appeal of a conversion to PR—at least in terms of the current interpretation of the VRA and vote dilution. As an example, in a 12-seat state such as North Carolina, if a group is geographically dense enough, it needs only to comprise about 4.17% of the electorate (50% of one district that is 1/12 of the statewide population) to win a congressional seat.

Depending on the quota formula used, a seat in a PR district costs (in terms of votes):

$$(\text{total \# of votes cast})/(\text{number of seats in the district}+1)$$

Let us assume that everyone in the CVD example is eligible to vote. Then, in one of the CVD's proposed three-member districts for North Carolina, a seat would require at least 25% +1 of the vote cast.

District	Population	Seat quota (Votes)
North Central (3 seats)	1,672,639	418,160
South Central (3 seats)	1,678,039	419,510
Eastern (3 seats)	1,653,497	413,375

By converting to PR, the CVD proposal actually increases the number of votes necessary to win a congressional seat. In the example, the entire population of the state is 6,628,637. The price of a seat in one of 12, single-member districts is currently only 276,405 votes (roughly 4.17% of the population). In a three-seat district, the price is substantially higher. Black electoral success would therefore depend on high turnout among black voters.

Thus, depending on the geographic distribution of minority voters, a conversion to PR might actually make it more difficult for minorities to elect candidates of their choice. If so, a conversion might invite a section 2 challenge. If a minority is densely packed, SMD's are actually better for its electoral fortunes. If it is spread widely across a state—so that it really could not be a majority in any given SMD, then PR is much more beneficial to its electoral prospects.

For PR to be successful, Congress and the Department of Justice would need to allow the alternative electoral systems to settle in and take effect—despite the fact that, at first, they might appear to dilute minority voting strength.

For example, cumulative voting was used to resolve litigation in Chilton County, Alabama (Dillard v. Chilton County 1988). In February, 1988, the county converted to a seven-member commission and school board which would be elected via cumulative voting. Accordingly, while Black voters comprised 11.86% of the Chilton county population, the threshold of exclusion was $(1/(s+1))$ or 12.5% of the vote. The district court stated that this was a vast improvement for the electoral fortunes of black voters because, in the prior at-large system, the threshold of exclusion was 50% +1. Still, insofar as racial bloc voting was present in the county, the settlement did require white crossover voting in order for a black candidate to win.

In the ensuing elections, a black candidate, Bobby Agee, received the largest number of votes. Pildes and Donoghue (1995) reported that Agee received very little crossover support from white voters. Only 13.4% of white voters cast even one of their seven ballots for Agee, while virtually all black voters gave him multiple votes. Nonetheless, the small crossover was sufficient to elect Agee.

Despite Agee's fortune, the Chilton County settlement does not make much sense in light of the amended VRA. The threshold of exclusion in Chilton County dictated that Agee had to receive crossover support to win. Insofar as he received just enough white support to do so, advocates of cumulative voting deem the settlement a success. But, if Agee (and any other black candidate) failed to win, would the settlement not be subject to a post-election vote dilution challenge? Given the black percentage of the electorate, one would expect that a section 2 resolution would have required an 8-member commission and school board with a threshold of exclusion of 11.1%.

The Chilton County settlement is instructive. While PR is generally regarded as a fairer electoral system, it does not necessarily work to the advantage of any discrete group—in the short run. Insofar as the VRA is committed to ensuring representational opportunities of particular racial minorities, it is grounded on representational philosophy that is antithetical to the philosophy of systemic fairness underpinning PR. For PR to bring about its desired results, Congress and the DOJ would have to be willing to retreat from the totality of circumstances test that currently underpins VRA litigation and allow arrangements such as the Chilton County settlement to operate.

Constitutional Constraints on PR

Constitutionally, there is no restriction on the use of PR. Put differently, there is no constitutional requirement for single-member districts. Article 1, Section 2 of the Constitution reads only:

The House of Representatives shall be composed of Members chosen every second year by the People of the several States. . . . Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.

The Framers did contemplate the use of single-member districts. Madison made a specific reference to them in Federalist 56. Nonetheless, until 1842 when Congress

mandated the use of single-member districts, no laws were passed affecting the method by which congressmen were elected. This law seemed to have little bite, however. It was not until 1967 (PL 90-196) that Congress outlawed their use completely. Thus, the choice of election method for congressmen is strictly a statutory matter.

PRACTICAL CONSIDERATIONS: WHAT PR WILL AND WON'T DO

It is important to bear in mind that there are limits to what PR alone can accomplish. PR works differently—not better—in other countries because they have different constitutional structures and emphasize different democratic values (such as discrete voter choices based on strong, closed, cohesive parties) than those emphasized in the United States (greater voter control at all levels of the electoral process). A switch to PR for electing members of Congress could result in a much less contentious redistricting process and potentially more representative legislature. But, it will do so only if we are willing to loosen our commitment to some of the other values (one-person, one-vote, the VRA's conception of vote dilution, the use of the direct primary) that currently underpin our electoral system.

With regard to the other claims made by PR advocates, they are all subject to qualification. There is indeed a correlation between the use of PR and increased levels of women's representation. However, the high levels of women's representation can also be attributed to the fact that the parties maintain a quota of women on their electoral lists. Thus, when voters vote for a party, they may be forced to support candidates whom they dislike. Sadly, some voters may not want to vote for a woman candidate. However, the quota system would allow them no choice in the matter. Thus, while PR may increase the number of partisan choices on election day, it also places important restraints on voter choice.

In contrast, the spirit of electoral reform in the United States has always pulled in an opposite, anti-party direction. The reforms of the presidential nominating process in the late 1960's and early 1970's as well as the Populist and Progressive reforms of the late 19th and early 20th centuries all led to the widespread use of direct primaries for nominations that currently characterize American politics. These reforms were an assault on the ability of political parties to close and control their nomination processes and, therefore, control the choices presented to voters on election day. Thus, PR's promise of being more women and minority-friendly may come at the price of popular control over nominations and candidate choice.

Advocates also contend that PR would lead to more ideologically cohesive and discrete parties and would lower the cost of campaigns. Again, this also can be attributed to the more centralized and hierarchical control exercised by party leaders over nominations and party finances. The price Americans pay for the direct primary and the ability to make financial contributions directly to the candidate of their choice is a highly individualistic electoral process which frequently emphasizes personality, not issues.

In other countries, less emphasis is placed on ensuring that all votes carry the same weight. In other words, there is no judicial equivalent of *Reynolds v. Sims* and the one person, one vote rule. Instead, electoral maps are drawn to ensure that the borders of provinces or regions are preserved. Then, seats are apportioned more or less on the basis of population, but with deviations much greater than anything tolerated by the one-person, one vote rule (see, e.g., Butler and Cain 1992; see also *U. S. Department of Commerce v. Montana*).

Finally, PR advocates contend that PR is less likely to "manufacture" a majority than the SMP system (see Amy 1993). That is, SMP is more likely to give a party with a minority of the vote a majority of the legislative seats in an election. This is due to the "wasting" of votes for losing candidates that occurs in the SMP system. If one counts as "wasted" a vote cast for a losing candidate then there is no response to this criticism. On the other hand, insofar as members of Congress and the state legislatures can be said to perform constituency service for all constituents, this challenge to SMP is less forceful.

As well, it is important to note that PR systems can also manufacture majorities. In fact, in their most recent national elections, the governing parties or coalitions in Denmark (1998), Germany (1998), Greece (1996), Ireland (1997), Italy (1996), New Zealand (1996), Norway (1997), Portugal (1995) and Spain (1996), all represented less than a majority of the voters (Rush and Engstrom, forthcoming). Thus, it is important to bear in mind that all electoral systems manufacture majorities to a certain extent.

CONCLUSION

I close with a note of caution. Politics works differently in other nations because their political and constitutional systems are organized differently and emphasize different democratic values. Where PR is used, it is usually part of a parliamentary system of government with no president. As a result, the tendency of PR to increase the number of parties in the legislature and foster coalition governments is not exacerbated by a constitutional separation of powers. Were Congress to divide into several parties, bargaining between the legislative and executive branches would be complicated tremendously. Furthermore, if the Congress were to encounter a legislative gridlock or were the governing coalition to fall apart, there would be no recourse to calling for new elections of a vote of confidence as there is in parliamentary systems of government.

Therefore, I urge the committee to consider carefully the broad implications of changing the method in which we elect members of Congress. Changing the electoral system will have a ripple effect throughout the constitutional system with consequences—such as an increased possibility of a gridlocked Congress within a gridlocked government—that may not be desirable.

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Mr. CANADY. Mr. Watt.

Mr. WATT. I have got two—you are economics and politics. I thought I had two constitutional professors, but maybe I shouldn't even worry about that.

Am I clear that everybody is in agreement that there is no constitutional problem with the bill? I meant to ask the first panel that, too. So all of our discussion is—Constitution aside, is this a good idea?

Let me pose—

Mr. CLEGG. Let me make one caveat on that. I am putting aside the scope of Congress' authority under Article I, Section 4, which would be the basis for your power to pass this bill, and I acknowledge that it is neutral on its face with respect to race, which is the issue that keeps getting raised today. But if the bill were passed because of a desire to inject racial considerations into the election process—and I am not asserting that this is what you are doing, but I am saying that if a court held that this was the reason that this bill was passed—it would be unconstitutional. So there is that caveat.

Mr. WATT. Okay.

Mr. PERSILY. Can I respond to that?

Mr. WATT. You can respond to it, but it is so hypothetical—

Mr. PERSILY. It would have to have a disparate effect as well.

Mr. CLEGG. Not necessarily.

Mr. WATT. Don't take me on my word. That is not part of my motivation.

Mr. CLEGG. That is why I qualified it by saying that.

Mr. WATT. All right. Let me put the federalism issue in this way for each one of you to respond to.

If you had no provision in law, Federal law, now that required single-member districts, and it is not unconstitutional not to have that provision, subject to what you just said, is it preferable to have us make that decision at the Federal level, or is it preferable to leave the debate and discussion and evaluation of what form of systems people are going to be adopting to the States? I am kind of putting that as the baseline federalism question.

Mr. CLEGG. Well, it depends. It was a hard question to answer in 1789. I think it is an easier question to answer now.

Mr. WATT. They were silent on it in 1789. This is a statute. There was nothing in the Constitution. This was put in the statute in 1967.

Mr. CLEGG. Right. What the Constitution said in 1789 is that is up to the States, unless Congress acts. Whether it would be wise for Congress to act was something that would have been difficult to say in 1789. It is less difficult to say now, because now you have the benefit of over 200 years' worth of experience. If Congress believes, looking at the way elections have been run in the States over the last 200 years, that there are some kinds of abuses that have tended to happen, it is entirely appropriate for Congress to step in and say, we are not going to allow that. We are not going to allow, for instance, racial discrimination in the way Representatives are elected.

My own view is that you do have a degree of knowledge about what is likely to happen if you punt to the States on this issue of at-large versus single-member issues. So I think it is appropriate for Congress to limit the States.

Mr. CANADY. Without objection, the gentleman will have 3 additional minutes.

Mr. WATT. Let me just say in response to that, even after today's hearing, I don't have a clue what the States—how the States would use this. I mean—

Mr. CLEGG. Actually, that is a reason not to pass the bill.

Mr. WATT. That takes us back to you don't have a clue whether it is the States' prerogative or whether it is the Federal Government's prerogative. I think that is your ultimate federalism issue.

Mr. ARRINGTON. Congressman, I would say in 1967 when the Congress decided to restrict States to only single-member districts, we had very little local experience with multi-member districts and semi-proportional voting systems. We had virtually no experience yet with the Voting Rights Act.

I would suggest that we have learned a lot in the last 20 years about different voting systems in the American context. I am not talking about Israel here. I am talking about in the American context. And I think that now we know enough to think that the States ought to try and experiment with multi-member districts and semi-proportional systems at the Congress level to see if that might give us somewhat better representation than we already have.

So I think it is appropriate to give the States some more authority in this matter. But, as I indicated in my written statement, I wouldn't give them *carte blanche*. I wouldn't say any multi-member system you want to set up is fine. You might want to put a limit as to how big those multi-member districts might be. You might want to specify that it has to have—if it is going to be a multi-member system, it has to have either semi- or proportional systems and some restrictions of that kind. Then maybe restrictions to say the judges cannot interpret this to say that they have this authority.

But with some restrictions I think it is a fair and modest proposal for the States to experiment, which is what they are supposed to do.

Mr. PERSILY. Just one point, which is that I see this as a coping mechanism. The States have had their authority in the redistricting area stripped away with each series of court decisions over the

last 30 years, and this gives them some vestige of autonomy to make some decisions that they would like to make.

Mr. RUSH. I will just say I agree with most of what has been said. I think the case law would still stand with regard to discriminating against minorities. And, again, by cutting the States loose to experiment, I don't know if I would necessarily put any restrictions on what system they could use. We may find that the States find a slick system—like the City of Cambridge's (which Professor Thernstrom said they were going to get rid of) single transferrable vote, that has worked in other countries before and here. Maybe they would use something different. I don't think there is any reason to restrict the States' prerogatives.

Mr. WATT. I want to express my thanks to all of these witnesses. I think this has been a very thoughtful and helpful panel. I appreciate all of you being here.

Mr. CANADY. Thank you, Mr. Watt.

I will now recognize myself briefly.

I am a little unclear about the different types of voting systems that we have talked about. I have heard terminology, and I think I have an understanding about the essence of some of the different types. There is cumulative voting, then there is preference voting, proportional representation or limited proportional representation, limited voting, single transferable voting systems, equal allocation cumulative voting. I mean, there are a lot of things. I guess some of the terms I have used are synonymous.

But could anybody give me a rundown of the top five and exactly how they work? Would anybody care to take a shot at that? Maybe Mr. Rush and Mr. Arrington?

Mr. ARRINGTON. Mr. Rush, let me start with my two favorites, and you can have any others you want. My two favorites are equal allocation cumulative voting. Let's assume we had the State of North Carolina with 12 Congressmen, so we divide that into four triple-member districts. In each district we are electing three.

In equal allocation cumulative voting, every voter would have three votes. But suppose when I went to the polls, I only found two people on the ballot I thought were worth voting for. I would only vote for two. Each would get a vote and a half. Suppose I only found one person I like. I vote for her. She gets three votes.

Clearly, we have experience in local governments, and that is very similar to the system they used in Illinois for many years for the State legislature.

My second favorite is limited voting. That means the same situation—

Mr. CANADY. Let me understand. The equal allocation is—

Mr. ARRINGTON. You allocate my three votes equally among those I vote for.

Mr. CLEGG. You couldn't split them two and one.

Mr. CANADY. Why is that important?

Mr. ARRINGTON. I will tell you why that is important. Let me give you the second one, and then I will tell you.

The other is limited voting. That is either three Congressmen are to be elected in my district, but each voter only has two votes. I could only vote for two I like. I could even vote for one I like, but if I voted for one, he would only get one vote. If I voted for two,

each one gets one vote. But I only get two votes. I can't vote for three.

The reason I like those two systems is that they do not ask the voter to do anything that voters don't already do. You have got a list of candidates, you vote for the candidate or you don't. You don't have to rank them. You don't have to decide how to allocate your votes. You have a list of names. You either vote for them or don't. That is exactly what voters do every year in hundreds of different offices.

The second reason I like the two systems is there is voting equipment on the market today which can handle those two systems without having a major change, without changing the way the ballot looks or giving the voter any additional things to do. That is the reason I like those two.

Your other types will all require changes in ballot type or structure or ask voters to do lots of other things, like rank the candidates.

Mr. CANADY. Mr. Rush, you want to add to that?

Mr. RUSH. I don't know if I would rank them in my top five or anything. The way I distinguish them is, basically, you have candidate-centered voting systems and more party-oriented ones. The candidate-centered ones are most of what we have been talking about today, cumulative votes, single transferrable votes, limited votes, where voters can either rank individual candidates or put more votes on one candidate than the other and so on and so forth.

Then there is party-centered systems, which I think would be a very radical departure here, where you really just get to vote for a party and it has a list of candidates in a particular district. That is really where you start thinking in terms of the "proportionality" of proportional representation, because you add up the number of votes for the party, and that is a certain percentage of the overall vote, and that translates into a certain percentage. The legislature or the district you are voting in and the parties are allocated seats on the basis of those percentages.

Things like cumulative voting, single transferrable vote and so on and so forth really allow voters to pick the candidates they wish in terms of intensity of their preference. So you can either enumerate them one through whatever, or move your votes around through putting two votes on one person.

Mr. CANADY. On that point, although those systems are not party-centered, wouldn't it be the case that they could make it more likely that third parties would proliferate?

Mr. RUSH. Certainly. Absolutely. Because you wouldn't need just simply to get 50 percent of the vote in a district to win. You might only need a quarter of the vote or whatever the case may be if you had three candidates or what have you.

Mr. CANADY. I noticed when Mr. Rush was giving his testimony earlier, Mr. Arrington, when he talked about his belief that moving toward a cumulative voting system, I think that is what you were talking about, could actually make it more difficult for minorities to elect someone, you shook your head. Would you say why?

I will give myself 3 more minutes.

Mr. ARRINGTON. As an empirical matter, that is simply not the way it works. The reason it doesn't work that way is the difference

between size and distribution. If you have a multi-member district rather than a single-member district, it may take more to elect, but your people to elect can be distributed, dispersed around that district. If you have a limited voting or a cumulative voting system, then it isn't going to take any more to elect. It is going to take the same number, and you can combine your people, even though they are dispersed geographically.

I mean, we have used this now. In the research that I did, we looked at 40 different local governments, mostly in North Carolina and Alabama, that are using limited voting and cumulative voting, and the evidence is that, when you do that, minorities do get elected, where before they were not getting elected. That is just the fact of it.

Mr. RUSH. My point was just, I mean, yes, they do get elected. However, if you look at this in terms of what the principal hurdle to election is, it is called the threshold of exclusion, the number of votes you need to get a seat with. If you just think in terms of what we go through right now in terms of the Voting Rights Act and the redistricting process, if you have a densely compact minority group, a single-member district, as ugly as it may look on any given map, doesn't require as many votes to get a seat as a multi-member district, just because the threshold does go up.

It is true, as Mr. Arrington said, yes, cumulative voting and different systems do work at the local level. However, mathematically, it does create the possibility under the right conditions the minority group you are trying to take care of or whose representational opportunity you are trying to ensure could actually find themselves left out in the cold if the votes didn't fall the right way.

One thing with systems like cumulative voting or anything that allows voters to cast more than one vote is that party leaders or group leaders, as well as the voters themselves, must think carefully and strategically. If you have too many candidates and their group splits its vote, you can end up with absolutely nothing, even though mathematically in terms of your voting age population you could elect someone.

So, again, it just raises the possibility, in the absence of careful strategy on the part of the voters and party leaders or group leaders, your group could be left out in the cold. I don't disagree with Mr. Arrington at all. Folks can get elected. It doesn't make it any harder, but they have to think more carefully, and they have to think harder.

Mr. ARRINGTON. If I could, Mr. Chairman, to play Mr. Rush's role for a moment, strategy also applies in single-member districts. You still have strategies in terms of do you oppose somebody in the primary.

Mr. CANADY. Again, that is going to apply in any electoral system. I think the point Mr. Rush has made is that any system can tend to dilute someone's vote or will dilute someone's vote. It depends on your perspective. There is no way to get away from that.

Mr. ARRINGTON. As Representative Campbell pointed out, the advantage of cumulative voting and limited voting is it allows people to define themselves in terms of their community and vote accordingly.

Let me add one other piece of evidence. Several times people have talked about the cost. If you look at the cost in a multi- versus a single-member race, you say, oh, boy, if it is a three-member district, I have to spend three times as much. In fact, in State legislatures it has not worked that way.

In North Carolina, for example, we have some single-member districts for the State legislature, some multi-member, some doubles and triples. In fact, candidates in the double- and triple-member districts actually spend less than members in the single-member districts. We think the reason for that is people in the same party share expenses, and it is also the case when you are running one on one you get that situation of negative campaigning that we see so often in races for Congress.

In multi-seat candidate, multi-seat districts, you are less likely to get that, and therefore you don't spend the money for the negative advertisement or to refute it. So, in practice, multi-member districts, at least for State legislatures, do not increase the costs of campaigning. That is true in Vermont, too. Those are the only two States for which I have data right now.

Mr. CANADY. Well, I appreciate all of you being here today. My additional time has expired.

Mr. WATT. Could I ask one question?

Mr. CANADY. The gentleman is recognized.

Mr. WATT. I keep thinking that multi-member districts, and I can't figure out why I believe this, make for the election of a more centrist candidate. I have heard discussion about the possibility that it makes it easier for the far right, the far left, out of mainstream candidates, more likely they would get elected.

But I thought the opposite. Am I just wrong about that?

Mr. CLEGG. The other folks are the experts on this, but my own thinking is that you are correct if you are talking about simple at-large elections. You have a larger electorate, so you are more likely to get somebody who reflects the entire electorate than if you divide the electorate into smaller districts.

But that is only if you are talking about at-large elections without some of the curlicues that we have also talked about.

Mr. WATT. Even with cumulative voting, people come up to me all the time and say, I agree with you 40 percent of the time, I agree with you 30 percent of the time, and I like you, and I wish I could cast one out of three votes for you, right? I would never cast all three of my votes for you, but—

Mr. CANADY. No one has ever told me that.

Mr. WATT. You make a lot of sense on the issues that I agree with you on. You are very studious on those issues, and I would like to vote for you, if I had some other options. You wouldn't be my top guy on the list, but, you know.

It seems to me that is the kind of thing that makes elected representatives more responsive to that kind of constituent.

Mr. CANADY. If I could interject, it seems to me the impact in electing people who are diverging from the mainstream will depend on how many seats you have in a multi-member district. If you have got three or four, I think the chances of that are not as great as if you go beyond that. That just seems to me to be the way that would work under a cumulative voting system.

Mr. ARRINGTON. I think you are exactly right, and I think Mr. Clegg is exactly right, too. In terms of whether you get somewhat more moderate or extreme results from a multi-member district system is something we just don't know. In all honesty, as a good theorist, I could make a theory either way, and we really don't know.

I think, Mr. Chairman, you have the key there. If the districts are very large, then you do open the possibility of having some minority candidates who are very minority, really out of the mainstream and represent very, very few people. If they are relatively large, three-, four-, maybe even five-member districts, that is unlikely to happen.

Mr. CLEGG. Mr. Arrington mentioned theory, and I think we have to be very careful if, when we are talking about legislation that is potentially this far-reaching, we are relying on theory and we don't have the empirical experience that we need.

I keep hearing the allusion to laboratories of democracy being used by Mr. Arrington and Mr. Persily. They are thinking of penicillin coming out of that laboratory. I think of Frankenstein. And the analogy is not far-fetched, because once the monster is out of the laboratory it can be very difficult to put him back in there.

Mr. CANADY. Well, I appreciate that. We are going to have to conclude. But let me just make one final observation and one concern, and that is that we have had a long period of litigation over the Voting Rights Act and how that is applied in the context of constitutional requirements. Now, I know there is dispute about how clear the situation is now, and some may say it is not so clear. Others would contend that we know more now and are moving toward a point where we are going to have greater certainty.

One concern that I would have with a proposal such as this is, having gone through that, and then we maybe don't go back to square one but we are going to plunge ourselves back into another round of Supreme Court cases, trying to figure out how these new systems that might be spun out of this would fit in the existing jurisprudence, and I am not sure that that is going to serve the interests of anyone.

That would be one concern that I would have. I just raised that as an additional point for us to consider.

But, again, I want to emphasize how much I appreciate each of you being here. I think the members of this panel and the last panel really have all brought important perspectives to this issue, and your testimony has been very valuable to the subcommittee.

Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 4:50 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF KATHARINE INGLIS BUTLER, PROFESSOR OF LAW,
UNIVERSITY OF SOUTH CAROLINA

INTRODUCTION

Article I, Section 4 of the Constitution empowers the states to determine the means by which members of the House of Representatives will be elected, subject to Congress's authority to enact overruling legislation. Congress has chosen to exercise its option and has mandated that house members be elected from single member districts. I am not persuaded that HR 1173 provides a wiser course.

I understand that the ultimate purpose of HR 1173 is to permit states to adopt electoral systems which will enhance minority representation without the drawbacks of race-based single member districts, for which a major drawback is their unconstitutionality. I leave to others to debate whether the cumulative voting scheme the sponsors desire is necessary to achieve their goal, and whether the goal is desirable. Regardless of how that debate comes out, it is highly unlikely that HR 1173 will accomplish its sponsors' goal. Moreover, HR 1173 presents concrete problems that far outweigh any speculative benefits it may have for increasing the number of minorities elected to the House.

CHARACTERISTICS OF THE ELECTION SYSTEMS WHICH WOULD BE AVAILABLE IF HR 1173 BECAME LAW

A multimember district in the context of Congressional elections is one in which all the voters of the district are permitted to vote for some number of representatives greater than one. A district might encompass an entire state. For example, South Carolina's six congressman could be elected "state-wide". It might encompass merely a part of a state. For example, half of South Carolina's population might be placed in a district that elected three congressman, while the remaining half might be placed in a second three person district, or, alternatively, divided among three single member districts.

In the most basic version of a multimember election district, all candidates run for all seats. Voters may, but need not, cast a vote for as many different candidates as there are offices up for election, and the candidates with the highest number of votes are elected. Voters are not permitted to cast more than one of their votes for the same candidate. Theoretically, all successful candidates for congress in a multimember district might live in the same apartment building, which is one of the criticisms directed toward this form of multimember district elections. Also if a large number of serious contenders are seeking election, and the electorate is highly fractured in its preferences, a candidate can win election with the votes of a fairly small percentage of electorate.

The benefit of this version of multimember district elections for politically cohesive minorities is that if they "single shot" vote or "bullet" vote (cast only one of their allotted number of votes for their first choice candidate), their candidate may be one of the top finishers. The success of this strategy is, however, highly dependent upon factors over which the group has no control such as the portion of the district's electorate they make up, the number of seats up for election, the number of candidates seeking the seats, and the degree to which other groups take advantage of the single shot technique. A common addition to the simple multimember district system is a majority vote requirement, particularly in the party primaries. This ad-

dition does not eliminate the advantage to minorities of single shot voting, but it does make success more difficult.¹

Cumulative voting is an added twist to the basic form of multimember district elections. With cumulative voting each voter may cast as many votes as there are seats to be elected and may cast multiple votes (up to their maximum allowable votes) for the same candidates. Any cohesive group of voters can take advantage of the option to cast all of its ballots for a single candidate, and if the number of voters so voting exceeds the "threshold of exclusion," their choice will be one of the winners.² While the sponsors of HR 1173 have in mind that racial and ethnic minorities will take advantage of this option, it is not so limited. Any group which can organize to support a single candidate can take advantage of the option.

HR 1173 does not limit states to the forms of multimember district elections that are theoretically favorable to minorities. Thus, a state may elect to use multimember districts, but not to permit cumulative voting. One quite legitimate variation of the basic multimember districting scheme is to add a "residency requirement," meaning that all voters in the district are able to vote for all seats, but candidates are required to run from specific geographic subdistrict. Each seat thus becomes a separate election, which means that neither "bullet voting" nor cumulative voting is an option for minority voters.³ Because all voters in the district vote for all seats, a candidate may finish first among voters in her residency district, but receive insufficient votes district-wide to be elected.⁴

REASONS NOT TO SUPPORT HR 1173

While the sponsors of HR 1173 are motivated by a desire to increase the number of minorities elected to Congress, HR 1173 will apply to all parts of the country, even those where the minority population is too small to take advantage of single shot voting, or even cumulative voting. Moreover, jurisdictions where these devices might enhance minorities' ability to elect candidates of their choice, are not compelled to adopt cumulative voting, and are empowered by HR 1173 to adopt systems less likely to produce successful minority candidates than the current single member district system.

Below I will elaborate briefly on the following reasons to oppose HR 1173.

1. The substantial national interest in the method of selecting members of the House of Representatives mandates that Congress, not the states, determine the matter.

2. The nation's interest in uniformity in the method of selecting house members outweighs any legitimate interest the states may have in tailoring the selection process to their particular needs.

3. Delegating the method of selecting house members to the states will lead to more, not less, political mischief than the current system where a state's ability to manipulate congressional elections is limited to single member districts.

- 4a. In the context of congressional elections, multimember districts, without the addition of cumulative voting, cannot rationally coexist with geographically based single member districts.

- 4b. Moreover, when multimember districts with cumulative voting are mixed with single member districts, the result is likely to be unconstitutional.

5. It would be particularly inappropriate for Congress to permit the states to selectively adopt "cumulative voting," which changes not merely the method of election, but changes fundamentally the nature of representation in the House.

In the final analysis, HR 1173 can be likened to the introduction of Kudzu to control erosion. The circumstances where it might lead to enhanced minority representation (using the sponsors notion of enhancement, meaning the election of minorities

¹For a more complete discussion of the impact of various electoral rules on the ability of a cohesive minority to elect candidates of its choice, see Butler, "Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote," 42 LA.L.REV. 1, 864-867 (1982).

²The threshold of exclusion is the percentage of the electorate a group must exceed in order to elect, by its votes alone, its preferred candidate. The formula is $1/1+(\# \text{ of seats}) \times 100$. So, in a three seat multimember district, a group must equal 25% of those voting to take advantage of cumulative voting. $(1/1 + 3 \times 100)$. Every group member must cast all three of their votes for the same person in order to prevail without non-group votes.

³Another variation which cuts off single shot options is to require candidates to qualify for specific seats (often called "numbered posts"). Unlike a residency requirement, a numbered post requirement seems to have no purpose, other than to prevent single shot voting.

⁴For example, if South Carolina had used this method to elect its six congressmen in the last election, and used its existing single member districts as "residency districts," it is possible, perhaps even likely, that some members of Congress who were elected by virtue of carrying their districts would have lost in a state-wide vote.

without reliance on non-minority votes) are few. Even here, the negative impact on representation in the House as we know it is substantial. In the vast majority of states, HR 1173 simply opens the door to permit gerrymandering to "grow wild."

1. *Congress will find it difficult to justify abdicating its responsibility to protect the national interest in the manner of selecting the House of Representatives.* Who is represented, what is represented, and how representation is accomplished are all highly influenced, indeed largely determined, by the method of electing the representative. Congress must protect the national interest in the method of selecting house members. Individual states' interests in the selection process are likely to be highly fluid, and by definition, provincial. At best, each state's interest will be determined by its own perceived representation interests. At worst, the state's interest will reflect the highly partisan interest of the dominant party at the time the selection is made. Congress is more likely to consider the long term impact of the method of election on the deliberative and representational function of the body as whole. Only Congress is likely to balance the members' duty to their constituents and their duty to legislate for the nation, both of which are influenced by the method of election.

The house members' influence over their states' choices will not substitute for Congressional protection of the national interest. Practically speaking, individual house members' influence over their states' choices will be determined largely by whether the member is of the same party as a majority of the state legislature. Moreover, the individual member's interest must be self preservation, not the interest of the body as a whole.

HR 1172 of course does not propose that any action be taken to change the method of electing house members. Rather it proposes ("merely proposes", its sponsors add) that the opportunity for change be provided, with debate of the merits of any proposed system to take place within the states who elect to take advantage of the opportunity. Reasonable minds may differ on the merits of any particular method of election, but there can be no doubt that any change in the selection method will have a significant impact on everything from who is elected to what interests are represented in the House. Any proposal with the potential for such fundamental change in the nature of the institution of the House should be subject a national, not regional, debate. Congress is the only entity positioned to hold such a debate and ultimately to determine whether change is in the nation's best interest. It would be a breach of trust to delegate this decision to the states.

2. *Uniformity in the method of electing house members is a more important interest than any advantage to the states presented by the opportunity to tailor the house representational scheme to suit their perceived individual needs.* The importance of uniformity in the method of electing each member of the House should be obvious. The benefits and burdens of the electoral system are the same for every candidate nationwide. Candidates for office in State A cannot claim be disadvantaged by the system relative to candidates in State B. The present uniform system provides every voter in every state with exactly the same relationship to his representative, vis a vis the electoral system. Each member has the same representational relationship to his/her constituents.

The current single member district system is the only method of election that provides nationwide uniformity. In even its most basic form, multimember districting cannot provide similar uniformity.⁶ A house member who, with one other member, shares representational responsibilities for a million people and a representative who, with nine others, shares responsibility for five million will face quite different tasks. The interests they must balance will be different; the compromises they must make will be different; the level of service they can provide will be different.

In a multimember district (without the added feature of cumulative voting), all members are subject to the same electorate. To the extent that members reflect their constituents, all persons elected from the same multimember district will be inclined to vote as a bloc. A multimember district "bloc" of, say, ten house members from California, will have greater clout than ten house members also from California, but elected from single member districts, and consequently by different constituencies.

Thus, a multimember districting scheme, regardless of whether it originates with Congress or with individual states, inevitably will mean a lack of uniformity, since not all districts will elect the same number of house members. Differences in the representational tasks faced by individual house members multiply when each state

⁶ By "most basic" I mean a system where each state becomes a single election district, from which all of its house members are elected "at-large." An alternative definition of "most basic" might be to have all multimember districts elect the same number of representatives, an option that would have been limited to number of representatives apportioned to the least populous state.

is permitted to add its own variations to the basic multimember scheme. As discussed further below, the very basis of who and what is to be represented is significantly different, depending upon whether the house member has been elected from a geographically based single member district or via a cumulative voting scheme.

I find it inconceivable that house members themselves would adopt a system that would bring about fundamental changes in the manner of their election, their representational and deliberative roles once in office, and their relationships with their constituents and with each other. To open the door to the states to bring about these changes without their input is the political equivalent of Russian roulette!

3. *Permitting the individual states to determine the method by which their congressmen will be elected will lead to more, not less, political mischief.* Redistricting is inherently a political game. Many decry this fact, but few with the power to remove politics from the process have been prepared to do so. No doubt at least partially in interests of self-defense, most legislators are willing to limit the weapons available for their mutual destruction. HR 1173 is an open invitation to loosen all restraints on gerrymandering for partisan advantage.

State legislatures's willingness to accept gerrymandering invitations was readily apparent in their response to pressures from the Justice Department and others to create minority controlled election districts. Most states, either by law or tradition, follow (at least most of the time) standard districting practices, such as compactness, respect for political subdivision lines, retention of existing district lines to the extent possible, and requiring that districts contain only areas that are contiguous. This was true of the states whose districting schemes were stricken as unconstitutional racial gerrymanders. Yet, the states were almost eager in their willingness to violate every sound districting principle to create these districts. One might suspect that the "need" to create minority districts was also seen as an opportunity to abandon sound districting principles for purely political reasons.

Imagine the holiday state legislatures will have in response to the panoply of new weapons HR 1173 makes available to legally "fix" election outcomes! Will a state's majority party be able to resist the temptation to take advantage of its superior strength state-wide, or in selected areas, to submerge their opponents into multimember districts it dominates, and to pack their opponents into single member districts to limit their impact? The constitution and the Voting Rights Act provide relief to racial and ethnic minorities whose voting strength is diluted by such tactics. A minority political party, however, has a more difficult time establishing that the impact of partisan gerrymandering is sufficient to violate the constitution. See, *Davis v. Bandemer*, 478 U.S. 109 (1986).

4a. *In the context of congressional elections, multimember districts, even without the addition of cumulative voting, cannot rationally coexist with geographically based single member districts.* The merits of multimember districts differ significantly, depending upon the context in which they are employed. Traditionally, in this country representation has been tied to territory. A Democrat elected from the state's Fifth Congressional District represents the district, not Democrats in general, or even the Democrats in his district. Hence, most districting standards enhance the creation of "territorial units" which can be represented sensibly. Creating "compact," "contiguous" districts that respect political subdivision lines increases the probability that districts will contain individuals whose proximity to one another makes their effective representation possible.

Within the context of a territorially based representational system, multimember districts make sense where they are logical alternatives to single member districts—where representation can be provided more effective by utilizing a multimember district rather than by dividing the same population into equi-populous single member districts. Prior to the advent of one-person, one-vote, many states followed a "little federal" system for electing their legislatures, with the upper chamber elected on the basis of one representative per county, and the lower chamber on the basis of population, but within counties—larger counties electing more representatives than smaller ones. If the "geographic unit" to be represented was the "county," it was logical that the entire electorate of larger counties vote for all of its representatives. Similarly, when one person, one vote constraints limited options for creating districts that contained equal populations and also respected political subdivisions, multimember districts could sometimes satisfy both objectives.

Congressional elections do not lend themselves to multimember district elections. The only sensible "unit" is the state itself. Any other conglomeration of the electorate appears to be purely arbitrary. Certainly there is nothing in HR 1173 that provides a rational basis to lump some part of a state into a multimember district, and divide other parts into single member districts. The option to provide multimember districts, without a guiding principle, simply provides another gerrymandering tool. It may not be unconstitutional, but neither is it laudable.

4b. *Moreover, when multimember districts with cumulative voting are mixed with single member districts, the result is likely unconstitutional.* Cumulative voting is not merely another method of election, comparable to the geographically based single member districts now in place. Rather, it changes the interests to be represented in the legislative body. The purpose of cumulative voting is to provide a form of direct "interest group" representation. Thus, in a multiparty political climate, party members, by concentrating their votes in support of fewer candidates than there are offices for election can achieve "representation" in accordance with their numbers in the electorate, without regard to their geographic dispersion. A representative elected under such a system represents, not the multimember district, but the "political party" or "interest group" that elected her.

I see potential constitutional problems if, as the sponsors of HR 1173 desire, some states decide to create multimember districts in parts of the state where racial or ethnic minorities will benefit from using cumulative voting, but then, either out of necessity or otherwise, divide the remaining population into single member districts. A six-member multimember district with cumulative voting is not the electoral equivalent of six single member districts. Interest groups within the single member districts are deprived of the opportunity for "interest group representation," made available to minorities in the multimember districts. The problem is not one person, one vote, but rather denial of a representational benefit to members of one politically cohesive group that has been made available to members of another.

Moreover, I think it is an open question whether cumulative voting, adopted for the purpose of providing racial minorities with "interest group" representation, escapes the intentional racial gerrymandering problem of race-based single member districts. If the purpose and effect of adopting cumulative voting is precisely to provide "race-based" representation, arguably this is simply a different form of racial gerrymandering, and is equally as unconstitutional. The "need" to comply with the Voting Rights Act is no more a defense to this form of racial gerrymandering than it is to the bizarre single member district form.⁶

5. *It would be particularly inappropriate for Congress to permit the states to selectively adopt "cumulative voting," which changes not merely the method of election, but changes fundamentally the nature of representation in the House.* As noted, cumulative voting changes more than the method of election. Because it provides for "interest group" representation, it also changes that which is represented. Without a doubt, a person's political interests are not determined solely, perhaps not even substantially, by where he lives. There clearly are representation alternatives which permit voters political interests to be more directly represented. In these "interest-based" systems, individuals with common political interests coalesce in political parties, some of which espouse quite narrow interests.

There are no doubt a myriad of reasons for our rejection heretofore of interest group representation in favor of geographic, or territorial, representation. One surely is that group representation is antithetical to the nation's founding principle that we are "one people." A system that permitted groups to be directly represented would not have helped to turn so many immigrants, many of them former enemies, into Americans.

The issue here, however, is not the merits of interest group representation via cumulative voting versus territorial representation via single member districts. Rather it is whether Congress can fairly permit a system that provides for direct interest group representation for some citizens, but not all. It is also whether such an important decision as a change in the basis of representation in the Nation's legislature should be left to the states.

If Congress wants to adopt cumulative voting, it should do so directly, with full appreciation for the consequences. It should first convince the citizens that direct group representation is in the best interests of our multicultural society. It should be sure that the citizens understand than an interest based system opens the door to *all* groups—abortion foes, advocates of choice, the gun lobby, white supremacists, and any other groups with the numbers to win a seat in Congress.

When cumulative voting is evaluated not merely for its impact on minorities, but with a full understanding of the changes it would bring about in representation as

⁶This is not the place for a full scale discussion of the Voting Rights Act's requirements. Suffice it to say here that neither Section 5 nor Section 2 of the Act requires the states to create bizarre minority-controlled single member districts. See *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Abrams v. Johnson*, 117 S.Ct. 1925 (1997). If the "need" to comply with these provisions cannot justify race-based single member districts, arguably the "need" cannot justify the selective adoption of cumulative voting to accomplish the same result—"racial interest group representation." Thus the sponsors view that HR 1173 would permit states like North Carolina, Georgia, and Texas to substitute cumulative voting for race-based single member districts is, in my opinion, incorrect.

we know it, I think it will not received the citizens' endorsement. Congress should not evade its obligation to get that endorsement by delegating the issue to the states.

PREPARED STATEMENT OF TIMOTHY L. STOREY, LEGISLATIVE MANAGEMENT
DEPARTMENT, NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. Chairman and members of the Committee, good afternoon and thank you for inviting me to present testimony. My name is Tim Storey and I am a Program Principal with the National Conference of State Legislatures. As many of you know, NCSL is the bipartisan organization of all fifty state legislatures as well as the U.S. territories and the District of Columbia I have been staff to NCSL's Redistricting Task Force for the past ten years. The Redistricting Task Force is a bipartisan committee of state legislators and legislative staff from all fifty states who are directly involved in redrawing the boundaries for congressional and legislative districts following the decennial census.

It is indeed a privilege to appear today at this hearing on the issue of congressional redistricting. Although NCSL has a formal policy making process, the Conference does not currently have a position on H.R. 1173, the States Choice of Voting Systems Act, which is before the Committee today. In fact, NCSL has not formally addressed the specific issue of whether states should have the option to use multimember districts when developing district plans for congressional elections. Because NCSL does not have a formal policy on this issue, I am limited, as staff to the organization, to remarks that neither oppose nor support the legislation being considered here today, so my comments will be brief.

I will provide context about how states are preparing to conduct redistricting following the 2000 census. I will also provide information on the use of multimember districts for state legislative elections. State legislators take the duty of redrawing congressional districts very seriously. In 45 states, the state legislature is responsible for passing congressional district maps for 2002 elections. In the other five states, a commission bears the responsibility.

Most states have begun to identify the key legislators and staff who will be leading the 2000 remapping effort. State legislatures are purchasing redistricting software and beginning to collect the data that will be used in analyzing and producing maps. Most states have enacted laws prohibiting local governments from changing voting district lines so that those voting district lines, or precinct lines, can be provided to the U.S. Census Bureau. The Census Bureau will then use those voting districts as geographic subdivisions when collecting and reporting 2000 census data. State legislators and staff, who will be developing the maps used for elections well into the next decade, are now beginning the considerable task of educating themselves on redistricting law, process, and technology.

In the past twelve months, NCSL meetings on redistricting have become significantly more popular as legislators attend seeking to understand the complex issues involved with redistricting. The 2000 redistricting cycle of congressional and legislative lines could be one of the most challenging in history. This is due to a number of factors including uncertainty in how aspects of the Voting Rights Act will be enforced relative to the redistricting process. As a result of a series of Supreme Court decisions in the 1990s on redistricting and the Voting Rights Act, there is uncertainty about how to draw districts that fully comply with the Act. Another complication is that states may placed in have to evaluate two different files of census data and choose which set of data is best for producing their state's new districts. Most state legislatures will also be asked to evaluate a greater number of externally developed plans than ever due to the proliferation of affordable mapping technology.

This job of redistricting is further complicated by relatively demanding and intense deadlines. States will receive their detailed 2000 census data on April 1st of 2001. Two states, Virginia and New Jersey, will have only a few months to draw maps for legislative elections to be held in November of 2001. The other 48 states have less than a year to accomplish the task in order to have districts in place for candidates to file their election papers before the state can conduct primary elections. Even though one more election will be held in most states before the legislators are in place who will tackle redistricting, most current state legislators are looking forward to the post-2000 census redistricting with mixed emotions of duty and dread.

Landmark Supreme Court decisions issued in the 1960s, beginning with *Baker versus Carr*, require legislatures to re-draw political district lines every ten years to meet the United States Constitutional standard of one person, one vote. Since the redistricting decisions of the 60s, the number of states using multimember districts

for legislative elections has declined steadily. In 1978, 23 states elected some or all of their state legislators from multimember districts. In 1988, 17 states used multimember districts to elect some or all of their legislators. As of today, 13 states use multimember districts for elections in at least one of their legislative chambers.

Courts have repeatedly reviewed the legality of multimember districts. Before the 1982 amendments to the Voting Rights Act, challenges to the use of multimember legislative districts were based upon alleged discrimination in violation of the Fourteenth Amendment (the Equal Protection Clause) or the Fifteenth Amendment (the right of citizens to vote) to the U.S. Constitution. The question of the constitutional validity of multimember districts focused not on population-based apportionment but on the representation afforded by the multimember districts as compared with single-member districts.

Today, a challenge to multimember legislative districts typically will arise when a racial or language minority group is of sufficient population that, if placed in a single-member legislative district, the group would constitute either a majority of the population or a significant percentage of the population in that district. As a majority or significant percentage of the population of a single-member legislative district, the racial group could have a considerable effect on the outcome of elections in the district. However, when placed in a multimember legislative district and combined with a larger population of another race, the racial group becomes a significantly smaller percentage of the population in the district and, consequently, its effect on the outcome of elections is proportionately diminished.

In a 1986 ruling, by the U.S. Supreme Court in *Thornburg v. Gingles*, the Court first construed the 1982 amendments to the Voting Rights Act as they related to multimember state legislative districts. In *Thornburg*, the Supreme Court reaffirmed that multimember legislative districts and at-large election schemes do not, per se, violate the rights of minority voters. The Court stated that minority voters who contend that the multimember form of districting violates their constitutional rights must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. Specifically, the Court held that, unless there is a conjunction of the following circumstances, the use of multimember legislative districts generally will not impede the ability of minority voters to elect representatives of their choice: The circumstances cited by the Court have become known as the "three prong *Gingle* test":

1. The minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member legislative district;
2. The minority group must show that it is politically cohesive; and
3. The minority group must demonstrate that the majority votes sufficiently as a bloc to enable the majority to usually defeat the preferred candidate of the minority.

With regard to multimember congressional districts, in 1967, Congress enacted legislation providing that, in each state entitled to more than one representative under an apportionment made pursuant to the decennial census of the population, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative." However, Congress has not repealed legislation enacted in 1929 providing to the contrary that:

- (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment . . . (2) if there is an increase in the number of Representatives, such additional . . . Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State . . . or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large. 2 U.S.C. § 2a(c).

Addressing the inconsistency between the statutes enacted in 1929 and 1967, a U.S. District Court in *Shayer v. Kirkpatrick* held that the 1967 statute, repealed by implication the 1929 legislation. That district court decision was affirmed by the Supreme Court. It seems fairly clear that it is within the power of Congress to enact legislation establishing rules for the drawing of congressional districts. Prior to the passage of the 1967 statute requiring single-member districts, it was not uncommon for some states to elect one or two members of Congress from the state at-large and the rest from single member districts.

In conclusion, let me summarize that the U.S. Supreme Court has held that the use of multimember legislative districts is not unconstitutional per se. However, the Court has invalidated the use of multimember legislative districts where their use impedes the ability of minority voters to elect representatives of their choice. Multimember districts under the current voting system for Congress that discriminate against a racial group would most likely be challenged under Section 2 of the Voting Rights Act, which only requires showing that an election practice results in discrimination.

Thank you again for inviting me to address the Committee.

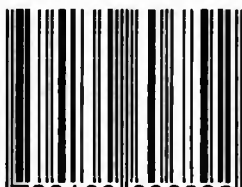


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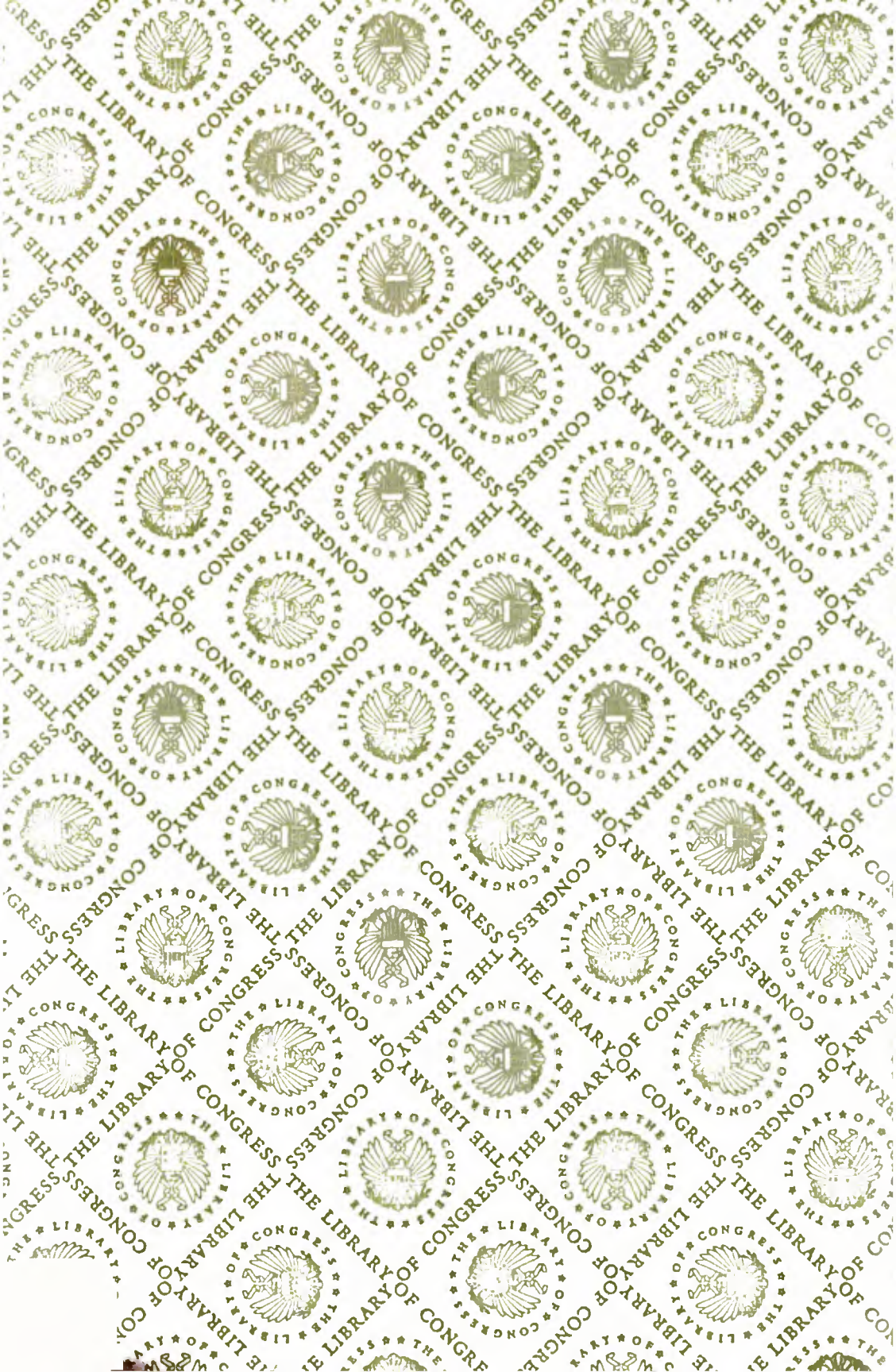
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